No. 18-431

IN THE

Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

MAURICE LAMONT DAVIS and ANDRE LEVON GLOVER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF

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QUESTION PRESENTED

Whether 18 U.S.C. § 924(c)'s residual clause is—like the identical residual clause in § 16(b)—unconstitutionally vague because it requires an ordinary-case categorical approach to identifying a "crime of violence."

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
INTRODUCTION	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	6
ARGUMENT	12
I. THE § 924(c) RESIDUAL CLAUSE IS UNCONSTITUTIONALLY VAGUE BECAUSE IT REQUIRES AN ORDINARY-CASE CATEGORICAL APPROACH	12
A. The statutory text requires an ordinary-case categorical approach, and no other reading is plausible	13
1. The residual clause applies to an "offense that is a felony" that "by its nature" "may" present a risk of force	13
2. The Court has twice interpreted § 16(b)'s identical language to unambiguously require an ordinary-case categorical approach	22
B. The statute's history confirms that Congress intended a categorical approach	24
1. Congress intentionally conjoined, not separated, § 16 and § 924(c)	24
2. Congress has accepted the courts of appeals' three-decade consensus that § 924(c) applies categorically	29
C. The categorical approach applies equally in the present-offense context	30

TABLE OF CONTENTS—continued

Page

II. CONSTITUTIONAL AVOIDANCE CANNOT JUSTIFY A FACT-SPECIFIC APPROACH 36

A. Striking down the § 924(c) residual clause will not impair the government's ability to secure lengthy sentences for violent offenders 37

B. The government's alternative reading expands its power under § 924(c) in unexpected and unjustified ways 40

C. Avoidance is inappropriate because the rule of lenity independently bars the government's construction 43

D. Adopting the fact-based approach would offend the separation of powers 46

III. EVEN IF THE COURT ADOPTS A NEW CONSTRUCTION OF THE STATUTE, RESPONDENTS' CONVICTIONS CANNOT BE REINSTATED 48

A. If the residual clause's "substantial risk" requirement is a conduct-based element, Respondents suffered multiple harmful constitutional violations 49

B. Respondents would prevail under an always-a-risk approach 51

C. The government's belated change in position precludes a remedy in its favor 52

CONCLUSION 53

ADDENDUM

TABLE OF AUTHORITIES

CASES Page

Apprendi v. *New Jersey*, 530 U.S. 466 (2000) 13
Ashton v. *Kentucky*, 384 U.S. 195 (1966) 50
Blount v. *Rizzi*, 400 U.S. 410 (1971) 11, 46
Clark v. *Martinez*, 543 U.S. 371 (2005) 6, 11, 14, 36, 47
Cleveland v. *United States*, 531 U.S. 12 (2000) 43
Corley v. *United States*, 556 U.S. 303 (2009) 17
Dean v. *United States*, 137 S. Ct. 1170 (2017) 27, 39
District of Columbia v. *Heller*, 554 U.S. 570 (2008) 40
Dowling v. *United States*, 473 U.S. 207 (1985) 48
Esquivel-Quintana v. *Sessions*, 137 S. Ct. 1562 (2017) 13
Gen. Dynamics Land Sys., Inc., v. *Cline*, 540 U.S. 581 (2004) 8, 30
Henson v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718 (2017) 33
INS v. *St. Cyr*, 533 U.S. 289 (2001) 43, 47
James v. *United States*, 550 U.S. 192 (2007), *overruled by Johnson* v. *United States*, 135 S. Ct. 2551 (2015) 15, 21, 23, 33
Jennings v. *Rodriguez*, 138 S. Ct. 830 (2018) 10, 36
Jerman v. *Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573 (2010) 8, 28
Johnson v. *United States*, 135 S. Ct. 2551 (2015) 1, 37, 45
Kolender v. *Lawson*, 461 U.S. 352 (1983) 42
Kucana v. *Holder*, 558 U.S. 233 (2010) 30

TABLE OF AUTHORITIES—continued

Page

Leocal v. *Ashcroft*, 543 U.S. 1 (2004) ..... *passim*
Manhattan Props., Inc. v. *Irving Tr. Co.*, 291 U.S. 320 (1934) 30
Mathis v. *United States*, 136 S. Ct. 2243 (2016) 49
McBoyle v. *United States*, 283 U.S. 25 (1931) 43
Merrill Lynch, Pierce, Fenner & Smith Inc. v. *Manning*, 136 S. Ct. 1562 (2016) 7, 22
Neder v. *United States*, 527 U.S. 1 (1999) ... 50, 51
New Hampshire v. *Maine*, 532 U.S. 742 (2001) 52
Nijhawan v. *Holder*, 557 U.S. 29 (2009) 19, 20
Rose v. *Clark*, 478 U.S. 570 (1986) 50
Rust v. *Sullivan*, 500 U.S. 173 (1991) 47
Sekhar v. *United States*, 570 U.S. 729 (2013) 28
Sessions v. *Dimaya*, 138 S. Ct. 1204 (2018) ..... *passim*
Skilling v. *United States*, 561 U.S. 358 (2010) 47, 48
Smith v. *City of Jackson*, 544 U.S. 228 (2005) 24
Smith v. *United States*, 508 U.S. 223 (1993) 41
Stirone v. *United States*, 361 U.S. 212 (1960) 50
Taylor v. *United States*, 495 U.S. 575 (1990) 23, 25, 32
Tex. Dep't of Hous. & Cmty. Affairs v. *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507 (2015) 24

TABLE OF AUTHORITIES—continued

Page

United Bhd. of Carpenters & Joiners of Am. v. *United States*, 330 U.S. 395 (1947) 50

United States v. *Amparo*, 68 F.3d 1222 (9th Cir. 1995) 42

United States v. *Aragon*, 983 F.2d 1306 (4th Cir. 1993) 16, 31

United States v. *Armour*, 840 F.3d 904 (7th Cir. 2016) 38

United States v. *Bass*, 404 U.S. 336 (1971) 43

United States v. *Bushey*, 617 F. Supp. 292 (D. Vt. 1985) 26

United States v. *Butler*, 496 F. App'x 158 (3d Cir. 2012) 29

United States v. *Chimurenga*, 760 F.2d 400 (2d Cir. 1985) 26, 31

United States v. *Cruz*, 805 F.2d 1464 (11th Cir. 1986) 26, 31, 44

United States v. *Diaz*, 778 F.2d 86 (2d Cir. 1985) 27, 31

United States ex rel. Guarino v. *Uhl*, 107 F.2d 399 (2d Cir. 1939) 31

United States v. *Gooch*, 850 F.3d 285 (6th Cir. 2017) 38

United States v. *Hayes*, 555 U.S. 415 (2009) 11, 19, 20, 44, 45

United States v. *Headspeth*, 852 F.2d 753 (4th Cir. 1988), *abrogated on other grounds by Taylor* v. *United States*, 495 U.S. 575 (1990) 31

United States v. *Jackson*, 865 F.3d 946 (7th Cir. 2017), *vacated*, 138 S. Ct. 1983 (2018) 29

TABLE OF AUTHORITIES—continued

Page

United States v. *Jenkins*, 849 F.3d 390 (7th Cir. 2017), *vacated on other grounds*, 138 S. Ct. 1980 (2018) 39

United States v. *Kozminski*, 487 U.S. 931 (1988) 45

United States v. *Kundo*, 743 F. App'x 201 (10th Cir. 2018) 38

United States v. *Kwai Fun Wong*, 135 S. Ct. 1625 (2015) 9, 30

United States v. *Lanier*, 520 U.S. 259 (1997) 44, 48

United States v. *Martin Linen Supply Co.*, 430 U.S. 564 (1977) 50

United States v. *Meyer*, 803 F.2d 246 (6th Cir. 1986) 26, 31, 34

United States v. *Resendiz-Ponce*, 549 U.S. 102 (2007) 49

United States v. *Rodriguez-Moreno*, 526 U.S. 275 (1999) 2, 10, 38

United States v. *Rogers*, 371 F.3d 1225 (10th Cir. 2004) 16

United States v. *Salas*, 889 F.3d 681 (10th Cir. 2018), *petition for cert. filed*, No. 18-428 (U.S. Oct. 3, 2018) 39

United States v. *Santos*, 553 U.S. 507 (2008) 6, 14, 44

United States v. *Sherbondy*, 865 F.2d 996 (9th Cir. 1988) 45

United States v. *Simms*, 914 F.3d 229 (4th Cir. 2019) ..... *passim*

United States v. *Singleton*, 182 F.3d 7 (D.C. Cir. 1999) 15, 35

United States v. *Smith*, 215 F. Supp. 3d 1026 (D. Nev. 2016) 51

TABLE OF AUTHORITIES—continued

Page

United States v. *Springfield*, 829 F.2d 860 (9th Cir. 1987), *abrogated on other grounds by United States* v. *Benally*, 843 F.3d 350 (9th Cir. 2016) 31
United States v. *Stevens*, 559 U.S. 460 (2010) 46
United States v. *Thompson/Ctr. Arms Co.*, 504 U.S. 505 (1992) 45
United States v. *Velazquez-Overa*, 100 F.3d 418 (5th Cir. 1996) 16
Wis. Cent. Ltd. v. *United States*, 138 S. Ct. 2067 (2018) 19
Yates v. *United States*, 135 S. Ct. 1074 (2015) 30, 43

STATUTES

Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 ..... 24, 25, 26
Firearms Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986) 27
First Step Act of 2018, Pub. L. No. 115-391 29
Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 ..... 24, 35
Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 32
8 U.S.C. § 1326(a) 41
16 U.S.C. § 3373(d) 41
18 U.S.C. § 16(b) 1, 24
§ 25(b) 36
§ 119(a) 36
§ 201 41
§ 471 41
§ 798 41

TABLE OF AUTHORITIES—continued

		Page
18 U.S.C.	§ 842(p)	33
	§ 924(c)	*passim*
	§ 1028	41
	§ 1951(a)	39
	§ 1959	33
	§ 2318	41
	§ 2320	41
	§ 2332b(a)(1)(B)	19
	§ 3142(f)(1)(A)	26, 32, 35
	§ 3553(a)	10, 16, 38
	§ 3559(c)(2)(F)(ii)	29
	§ 4042(b)(3)	35
34 U.S.C.	§ 10596(2)(B)	29
	§ 10613(b)(2)	29
	§ 10651(a)(8)	29

RULES

Fed. R. Crim. P. 12(b)(1)	42
Fed. R. Crim. P. 30(d)	52
Fed. R. Evid. 404	18

LEGISLATIVE MATERIALS

H.R. 7113, 115th Congr. (2d Sess. 2018)	21, 46
132 Cong. Rec. E1390-02 (1986)	27
131 Cong. Rec. S16903-03 (1985)	27
S. Rep. No. 98-225 (1983)	25, 29
S. Rep. No. 97-307 (1981)	8, 25, 34

SCHOLARLY AUTHORITY

Note, *The New Rule of Lenity*, 119 Harv. L. Rev. 2420 (2006)	45

TABLE OF AUTHORITIES

OTHER AUTHORITIES — Page

OXFORD DICTIONARY OF ENGLISH (3d ed. 2010) 15

U.S. Sentencing Comm'n, *Mandatory Minimum Penalties for Firearms Offenses in the Federal Criminal Justice System* (Mar. 2018) 38

U.S. Sentencing Guidelines Manual (U.S. Sentencing Comm'n 2018) 39

INTRODUCTION

In *Sessions* v. *Dimaya*, the government all but conceded that the residual clauses in 18 U.S.C. §§ 16(b) and 924(c)(3)(B) must stand or fall together. It warned that invalidating § 16(b)'s "crime of violence" definition would imperil "the same statutory language" in § 924(c). Brief for the Petitioner 52–53, *Sessions* v. *Dimaya*, 138 S. Ct. 1204 (2018) (No. 15-1498) [*Dimaya* U.S. Br.]. But the Court struck down § 16(b) because it required an ordinary-case categorical approach with "the same two features," "combined in the same constitutionally problematic way," as the ACCA residual clause the Court invalidated in *Johnson* v. *United States*, 135 S. Ct. 2551 (2015). See *Dimaya*, 138 S. Ct. at 1213; *Leocal* v. *Ashcroft*, 543 U.S. 1, 7 (2004). And the government now concedes that "construing Section 924(c)(3)(B) to incorporate an ordinary-case categorical approach"—as *Leocal* and *Dimaya* construed the same language in § 16(b)—"would render it unconstitutional." Br. 45.

It is time for the other shoe to drop. *Johnson* and *Dimaya* held that an ordinary-case categorical approach violates due process. *Leocal* and *Dimaya* held that § 16(b) requires that approach. And the government concedes, as it must, that § 924(c)'s residual clause is "materially identical" to § 16(b). *Dimaya* U.S. Br. 53; see also Br. 32. That should be the end of this case.

Even so, the government argues that § 924(c)'s residual clause should be read differently from § 16(b). In fact, it says § 924(c)'s residual clause is "best read to require a circumstance-specific inquiry by the jury" into "the 'risk[iness]' of the defendant's actual conduct." Br. 20, 26 (alteration in original) (initial capitals omitted).

No one thinks that is the best reading of § 924(c)'s residual clause. The government does not really think so; it accepted a categorical reading of § 924(c) for "many years." Br. 22, 33, 39. The courts of appeals do not think so; they swiftly settled on a categorical reading of both § 16(b) and § 924(c) based on the plain language of these identical provisions, and maintained that consensus for three decades. Congress does not think so; despite often amending § 924(c) to override judicial decisions it disagrees with, it has not changed a word in § 924(c)'s residual clause since 1986. And this Court does not think so. It held unanimously that § 16(b)'s identical text "requires us to look to the elements and the nature of the offense of conviction, rather than to the particular facts [of the defendant's] crime," *Leocal*, 543 U.S. at 7, reiterating just last Term that this language "has no 'plausible' fact-based reading," *Dimaya*, 138 S. Ct. at 1218 (plurality).

The reason for the government's analytical contortions is obvious: It does not like the "practical consequences" of striking down the residual clause. Br. 49. But even if that were a proper reason to uphold an unconstitutional statute, the government's scaremongering is unjustified. Most § 924(c) defendants are convicted under the drug-trafficking or elements clauses. This case will not affect those prosecutions. Even defendants charged under the residual clause will not simply go free. By definition, a § 924(c) defendant is already "subject to punishment for" his predicate offense. *United States* v. *Rodriguez-Moreno*, 526 U.S. 275, 280 (1999). And without a § 924(c) charge, that punishment will often be enhanced, under the Sentencing Guidelines, for weapons use. In fact, the government's own cases show that many defendants could receive the same sentence without the

§ 924(c) conviction. In all events, if this Court invalidates the current residual clause, Congress will be free to adopt a new one that does not offend the Constitution.

There is thus no reason for this Court to join the government in trying to distinguish § 924(c) from § 16(b). Congress gave these laws the same language to serve the same function, and has never seen fit to distinguish them. As one goes, so goes the other.

STATEMENT OF THE CASE

A grand jury returned an indictment charging Maurice Davis and Andre Glover with a series of gas station robberies. 5th Cir. Record on Appeal (ROA) 1148–1160.[1] This case focuses on Count One, conspiracy to commit robbery in violation of the Hobbs Act, and Count Two, violating § 924(c) by brandishing a short-barreled shotgun in furtherance of Count One. Count Two alleged that the conspiracy charged in Count One was a crime of violence, but did not allege that the conspiracy was committed in a way that risked the use of physical force. See ROA 1152. Counts Three through Six charged three robberies; Count Seven charged a separate § 924(c) violation for brandishing a short-barrel shotgun in furtherance of one of those robberies. Count Eight charged Mr. Davis with being a felon in possession of a firearm.

Before trial, Respondents moved to dismiss the § 924(c) charges because—like the ACCA's residual clause—§ 924(c)'s residual clause requires an ordinary-case categorical approach that cannot be applied constitutionally. ROA 1245–1253. Their motion relied on the well-settled view that § 16(b) calls for an ordi-

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1 In citing the Fifth Circuit record, this brief uses the record pagination assigned to Mr. Davis's appeal.

nary-case categorical approach. ROA 1248–1250. The government did not disagree. Instead, it relied on *Leocal* to argue that § 924(c)'s residual clause is narrower than the ACCA's residual clause, and not vague, because § 924(c) "does not go beyond the elements of the offense." ROA 1259. The district judge took the motion under advisement until sentencing, ultimately denying it. Pet. App. 19a, 22a.

While the motion was still pending, the government submitted an agreed proposed jury charge asking the court to instruct the jury that conspiracy to commit robbery was a "crime of violence" under § 924(c). ROA 1298–1300. The district court agreed, instructing the jury that both robbery and conspiracy to commit robbery were categorically crimes of violence. ROA 1361. The jury therefore had no opportunity to decide, and Respondents had no opportunity to address, whether this particular conspiracy presented a substantial risk of the use of force.

Based on those instructions, the jury convicted Respondents of both § 924(c) counts. ROA 1368–1371. Mr. Glover was convicted of three robbery counts; Mr. Davis was acquitted of one but convicted of two. ROA 1368–1371. Mr. Davis was also convicted of being a felon in possession of a firearm. ROA 269–272, 1392–1394. At the time, the combined effect of the two § 924(c) convictions was a mandatory minimum of 35 years in prison, consecutive to any other sentence.[2] See § 924(c)(1)(B)(i), (C)(i), (D)(ii). In total, Mr. Davis was sentenced to over 50 years' imprisonment and two years of supervised release, and Mr. Glover was sentenced to over 41 years' imprisonment and two

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2 Respondents reserve the right to invoke Congress's December 2018 clarification to § 924(c) in the event Count Two is reinstated. *Cf.* Br. 8–9 & n.1.

years of supervised release. ROA 270, 1393. Without the convictions on Count Two, Count Seven would carry a minimum of ten years in prison.

On appeal, Respondents again argued that § 924(c)'s residual clause is unconstitutionally vague. Pet. App. 12a–13a. Mr. Glover argued alternatively that the jury should decide whether a predicate offense is a § 924(c) "crime of violence." The government responded that Mr. Glover *invited* any error because he joined the agreed proposed jury charge, and that he should not be allowed to "speculat[e] on a verdict, and then, when the speculation turns out badly, escap[e] the consequence of having done so." U.S. 5th Cir. Br. 26–29 (internal quotation omitted). The government also argued that "it was not error at all" to apply the categorical approach: "whether a predicate offense is a crime of violence is 'a question of law that should not be submitted to the jury.'" *Id.* at 28. And the government insisted that the vagueness analysis for § 924(c) must be the same as for § 16(b), since the two laws use "precisely the same language," and "the same language either is or is not unconstitutionally vague." *Id.* at 24.

The Fifth Circuit affirmed the convictions. Pet. App. 12a–14a. Respondents then sought review in this Court, which vacated the Fifth Circuit's decisions and remanded for further consideration in light of *Dimaya*. 138 S. Ct. 1979 (2018).

When Respondents renewed their vagueness claim on remand, the government changed its position. It abandoned its "longstanding" view that § 924(c)'s residual clause demands an ordinary-case categorical approach and urged the Fifth Circuit to adopt "a new 'case specific' method" which would "compare § 924(c)'s residual definition to the 'defendant's actual conduct.'" Pet. App. 4a. The court rejected that invita-

tion as foreclosed by binding circuit precedent and held that § 924(c)(3)(B) is, like § 16(b), unconstitutionally vague. *Id.* at 5a. Because conspiracy could qualify as a "crime of violence" only under the residual clause, *id.* at 4a, the Fifth Circuit vacated Respondents' convictions on Count Two, *id.* at 6a. Judge Higginbotham concurred in the vacatur, but dissented in part because the majority did not order resentencing. *Id.* at 7a–9a. After Respondents moved for panel rehearing, the government agreed that they should be resentenced on all counts. See Response of the United States to Appellants' Petitions for Panel Rehearing 10.

SUMMARY OF ARGUMENT

I. Every tool of statutory interpretation shows that the government's fact-based reading of § 924(c)'s residual clause is not plausible. This provision can only be read, like § 16(b), to require an ordinary-case categorical approach. And the government concedes that, so read, it is unconstitutional. Br. 45.

A. The § 924(c) residual clause is, apart from a single comma, identical to § 16(b). Its text thus demands the same ordinary-case categorical approach the Court applied in *Leocal* and *Dimaya*.

1. The phrase "offense that is a felony" must refer generically to the offense as defined by Congress. This reading is consistent with ordinary usage. The government's view, by contrast, would give this single statutory phrase two different meanings at once: It would refer to an "offense" categorically when introducing the elements clause, but would refer to brute facts for the residual clause. This Court has "forcefully rejected" "such interpretive contortion." *United States* v. *Santos*, 553 U.S. 507, 522 (2008) (plurality); *Clark* v. *Martinez*, 543 U.S. 371, 378 (2005).

The phrase "by its nature" similarly compels a categorical approach. "Nature" means "normal and characteristic quality" or "basic or inherent features." This phrase thus "tells courts to figure out what an offense normally—or, as we have repeatedly said, 'ordinarily'—entails." *Dimaya*, 138 S. Ct. at 1217–18 (plurality). The government's reading cannot be squared with this definition; a defendant's specific actions on one occasion have no "characteristic" or "inherent" qualities. The government's approach thus deprives this statutory language of any meaning. The government's proof-of-concept jury instructions confirm this problem: All but one *omit* "by its nature" entirely, and the last makes no effort to explain to the jury how to apply this language.

The statute's remaining language bolsters this reading. Section 924(c)(1)(A) refers to "a crime of violence ... *that provides for* an enhanced punishment." Statutory offenses, not case-specific facts, "provide for" punishment. Indeed, the entire structure of § 924(c) contemplates a categorical inquiry; "drug-trafficking crime[s]" and the elements clause both apply categorically. It is only natural to read the residual clause the same way. And the statute does not use the sort of specific language this Court has read in other cases to require a fact-based inquiry. That the statute requires a risk determination does not suggest a fact-based approach.

2. "This Court's precedents interpreting identical statutory language positively compel" a categorical approach. *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Manning*, 136 S. Ct. 1562, 1567 (2016). This Court has twice read § 16(b)'s identical language to require an ordinary-case categorical approach. *Dimaya*, 138 S. Ct. at 1217 (plurality); *Leocal*, 543 U.S. at 7, 12 n.8. The same text requires the same result here.

B.1. Section 924(c)'s residual clause and § 16(b) are identical twins, created by Congress at the same time to serve the same purpose with the same meaning. Section 924(c) originally applied to any federal felony. In 1984, Congress "narrow[ed]" it to reach only the newly created category of "crime[s] of violence." S. Rep. No. 97-307, at 888–89 (1981). Section 924(c) did not define "crime of violence," but cross-referenced § 16's definition.

The courts quickly settled on a categorical reading of § 924(c) that excluded drug trafficking, since such an offense does not *by its nature* involve a sufficient risk of violence. Congress in 1986 abrogated these decisions—but *not* by changing the "crime of violence" definition. Instead, it added "drug trafficking crime" as a separate categorical predicate and copied-and-pasted § 16's "crime of violence" definition into § 924(c)(3)—knowing that courts had construed it categorically. Congress thus readopted that approach for § 924(c). *E.g.*, *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich L.P.A.*, 559 U.S. 573, 590 (2010).

2. Over the next three decades, "the considered circuit consensus [was] that § 924(c)(3)(B) requires an ordinary-case categorical approach." *United States* v. *Simms*, 914 F.3d 229, 249 (4th Cir. 2019) (en banc). Yet Congress has never changed § 924(c)'s "crime of violence" definition, even though it has often amended the statute. The "very strength of this consensus" among the circuits, combined with "congressional silence after years of judicial interpretation," confirms that the categorical approach is correct. *Gen. Dynamics Land Sys., Inc.*, v. *Cline*, 540 U.S. 581, 593–94 (2004).

C. The government nevertheless argues that § 924(c) should be interpreted differently from § 16(b). It says the categorical approach developed to address practical and constitutional concerns arising in the *prior*-conviction context, and since those same concerns do not apply in the *present*-offense context, the categorical approach should give way to the "more workable" fact-based approach. Br. 39–42.

This argument stretches the principle of contextual interpretation too far. Words have meaning, and the detailed 34-word residual clause is not the sort of "utterly unremarkable phrase" Congress often uses to mean different things in different contexts. See *United States* v. *Kwai Fun Wong*, 135 S. Ct. 1625, 1634 (2015). The government's request would be unprecedented.

The government's argument also fails on its own terms. The lower courts adopted the categorical approach to § 16(b) and § 924(c) because that is what the text requires. This Court, too, has "consistently understood *language* in the residual clauses of both ACCA and § 16 to refer to 'the statute of conviction, not to the facts of each defendant's conduct.'" *Dimaya*, 138 S. Ct. at 1217 (plurality) (emphasis added).

The categorical approach also preserves Congress's decision in 1984 to narrow § 924(c)'s scope from all federal felonies to only "crimes of violence." Under the government's fact-based reading, by contrast, § 924(c) could again reach any federal felony based on the facts of the case—including the presence of the gun. Every federal felony could thus become a "crime of violence," regardless of its "nature." The government's reading would therefore undo Congress's work and would subject even legal gun owners to potential § 924(c) liability if they committed a federal crime in a risky manner.

II. The government's appeal to constitutional avoidance is misplaced. Avoidance is a means of choosing between multiple "plausible construction[s]." *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 842 (2018). But the residual clause's language is unambiguous, *Leocal*, 543 U.S. at 11 n.8, and it has no plausible fact-based reading, *Dimaya*, 138 S. Ct. at 1217–18 (plurality). If avoidance could not save § 16(b), it cannot save § 924(c)'s residual clause either.

A. Contrary to the government's dire warnings, striking down § 924(c)'s residual clause will not prevent violent criminals from being punished. A vagueness ruling would not imperil convictions under the drug-trafficking or elements-clause predicates. Only a small proportion of defendants could avoid § 924(c) liability without the residual clause. Moreover, every potential § 924(c) defendant is also "subject to punishment for" the predicate offense. *Rodriguez-Moreno*, 526 U.S. at 280. That punishment must account for the "nature" *and* "circumstances" of the crime, see § 3553(a)(1), "which will necessarily include whether the offender used a firearm," *Simms*, 914 F.3d at 253.

B. While a vagueness holding would not seriously impair the government's use of § 924(c), the government's new fact-based approach would expand the crime beyond all recognition. Divorced from the predicate crime's elements, the § 924(c) offense would have no principled limits. Prosecutors could convince a jury that any felony, even a typically non-violent crime, was a "crime of violence" under the new approach. This surprising expansion of § 924(c) would make the crime far broader and even less predictable than it is now. Given the severity of § 924(c)'s penalties, this loss of notice and predictability is unacceptable.

C. Even if the § 924(c) residual clause were ambiguous, the Court "would be constrained" by the rule of lenity. *Leocal*, 543 U.S. at 11 n.8. The fact-based approach would dramatically expand § 924(c)'s reach while making its application in many cases even more uncertain. Adopting that approach would thus offend the constitutional principles of fair notice and separation of powers, which give rise to both the rule of lenity and the void-for-vagueness doctrine. As the Chief Justice has explained, a statute that may apply either categorically (and narrowly) or factually (and broadly) is "a textbook case" for lenity. *United States* v. *Hayes*, 555 U.S. 415, 436 (2009) (Roberts, C.J., dissenting). Lenity therefore bars the government's fact-based approach—whether or not avoidance would otherwise support it.

D. Adopting the government's view would require rewriting the statute. It is "for Congress, not this Court," to undertake that task. *Blount* v. *Rizzi*, 400 U.S. 410, 419 (1971). Avoidance is "a means of giving effect to congressional intent, not of subverting it." *Clark*, 543 U.S. at 382. There is ample evidence, both textual and historical, that Congress intends § 924(c) to apply categorically.

Avoidance is often used to narrow the reach of a statute when its outermost applications raise constitutional issues. It has never been used, however, to *expand* the reach of a criminal statute beyond what Congress mandated. Nor can it: Only Congress has the power to define federal crimes. Using avoidance to adopt the government's position would intrude on Congress's exclusive authority and arrogate to the judiciary the power to make criminal law.

III. However the statute is construed, Respondents' residual-clause convictions cannot stand. Respondents were indicted, tried, and convicted under the

categorical approach, which the government agrees is unconstitutional. Thus, neither the grand jury nor the trial jury found the new risk-based "element" the government's approach requires, and Respondents had no opportunity or incentive to contest that factual element. This situation causes multiple overlapping constitutional errors, which either are structural or cannot be deemed harmless on this record. And all of these problems arose because the government convinced the lower courts to apply the categorical approach. Having obtained Respondents' convictions on a concededly unconstitutional basis—and having prevented them from building a record to defend against its new theory—the government cannot preserve those convictions by changing positions after years of litigation.

ARGUMENT

I. THE § 924(c) RESIDUAL CLAUSE IS UNCONSTITUTIONALLY VAGUE BECAUSE IT REQUIRES AN ORDINARY-CASE CATEGORICAL APPROACH.

The government concedes that "construing Section 924(c)(3)(B) to incorporate an ordinary-case categorical approach would render it unconstitutional." Br. 45. That concession is fatal, because the statutory text, structure, and history—not to mention this Court's precedents—all require an ordinary-case categorical approach. Section § 924(c)'s residual clause thus has the same "pair of features—the ordinary-case inquiry and a hazy risk threshold—that *Johnson* [and *Dimaya*] found to produce impermissible vagueness." *Dimaya*, 138 S. Ct. at 1218.

A. The statutory text requires an ordinary-case categorical approach, and no other reading is plausible.

Section 924(c)'s instruction to identify an "offense that is a felony" that "by its nature" involves a substantial risk that force "may be used" requires an ordinary-case categorical approach. This Court's precedents interpreting § 16(b)'s identical language confirm this straightforward reading.

1. The residual clause applies to an "offense that is a felony" that "by its nature" "may" present a risk of force.

"We begin, as always, with the text." *Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562, 1568 (2017). Section 924(c)(3) defines a "crime of violence" as

> an offense that is a felony and—
>
> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Every aspect of this language requires a categorical, rather than a fact-based, inquiry.

a. The subject of the residual clause—"offense that is a felony"—refers generically to the statute the defendant has violated rather than his specific conduct. "Simple references to a ... 'felony,' or 'offense,' ... are 'read naturally' to denote the 'crime as *generally* committed.'" *Dimaya*, 138 S. Ct. at 1217 (plurality) (quoting *Nijhawan* v. *Holder*, 557 U.S. 29, 34 (2009)); see, *e.g.*, *Apprendi* v. *New Jersey*, 530 U.S. 466, 478

(2000) (using the phrase "felony offense" in this way). The phrase "offense that is a felony" thus directs a court "to look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to [a defendant's] crime." *Leocal*, 543 U.S. at 7.

The government argues that "offense" can also "refer to the specific acts in which an offender engaged on a specific occasion." Br. 26 (quoting *Nijhawan*, 557 U.S. at 33–34). In some contexts, perhaps. But not here. The single phrase "offense that is a felony" in § 924(c)(3) forms the subject of both the elements clause and the residual clause. And the government agrees that the elements clause refers to crimes categorically. Br. 26; see *Leocal*, 543 U.S. at 7–10. Because a fact-specific reading of "offense that is a felony" cannot apply to the elements clause, it cannot apply to the residual clause either: "[T]he statute's single reference to an 'offense that is a felony' has a single meaning: it refers to a crime as defined by statute." *Simms*, 914 F.3d at 242.

Any other interpretation would give this single statutory phrase "two contradictory meanings, depending on whether the force clause or the residual clause is in play." *Id.*; see Br. 27. But to "interpret" a statutory term "to mean [one thing] for some predicate crimes, [and another] for others" would require too much "interpretive contortion." *Santos*, 553 U.S. at 522 (plurality). Rather, the Court has "forcefully rejected" the idea of "giving the same word, *in the same statutory provision*, different meanings *in different factual contexts*." *Id.* (citing *Clark*, 543 U.S. at 378). To do so "would be to invent a statute rather than interpret one." *Clark*, 543 U.S. at 378.

b. The qualifying phrase "by its nature," which introduces the residual clause, likewise requires a cat

gorical inquiry. The natural reading of "by its nature"—in fact, the only reading that makes sense in context—is a reference to the defendant's offense in the abstract.

Because "by its nature" refers back to "offense," the "nature" a court must consider is that of the "offense that is a felony." See *Leocal*, 543 U.S. at 7. And because the "offense that is a felony" must be the offense as defined by Congress, "the use of the word 'nature' refers to a legal charge rather than its factual predicate." *United States* v. *Singleton*, 182 F.3d 7, 11 (D.C. Cir. 1999).

The plain meaning of "by its nature" confirms this reading. The government agrees (Br. 30) that an "offense's 'nature' means its 'normal and characteristic quality,'" *Dimaya*, 138 S. Ct. at 1217 (plurality), or its "basic or inherent features, character, or quality," OXFORD DICTIONARY OF ENGLISH 1183 (3d ed. 2010). The residual clause thus looks to "the basic or inherent features of 'an offense that is a felony,'" *Simms*, 914 F.3d at 241, "tell[ing] courts to figure out what an offense normally—or, as we have repeatedly said, 'ordinarily'—entails, not what happened to occur on one occasion," *Dimaya*, 138 S. Ct. at 1217–18 (plurality). Indeed, *Leocal* emphasized that § 16(b)'s use of "by its nature" "requires us to look to the elements ... of the offense of conviction." 543 U.S. at 7. The Court's opinion in *James* v. *United States* similarly used "by its nature" to describe the ACCA residual clause's categorical inquiry even though the ACCA does not contain those words. 550 U.S. 192, 209 (2007), *overruled by Johnson*, 135 S. Ct. 2551.

The government's fact-based reading of "by its nature," by contrast, does not fit with the ordinary meaning of these words. "[E]ither a crime is violent 'by its nature' or it is not. It cannot be a crime of vio-

lence 'by its nature' in some cases, but not others, depending on the circumstances." *United States* v. *Velazquez-Overa*, 100 F.3d 418, 420–21 (5th Cir. 1996).

The government acknowledges that this Court has read "by its nature" "as an indication that the definition of 'crime of violence'" in § 16(b) "requires a categorical approach." Br. 32. It says, however, that "the 'nature' of a prior conviction and the 'nature' of the [present] offense" are different: "the 'nature' of a prior conviction may be the legal determination" of guilt, while "the 'nature' of a current offense is the defendant's particular conduct." *Id.* But this argument begs the question by assuming that "the defendant's particular conduct" is the "offense that is a felony" to which § 924(c)'s residual clause refers. And the government is alone in seeing this distinction. The courts have consistently read § 924(c), and other provisions using the same language in the present-offense context, to require a categorical approach *precisely because* "'by its nature' relates to the *intrinsic* nature of the crime, not to the facts of each individual commission of the offense." *United States* v. *Aragon*, 983 F.2d 1306, 1312 (4th Cir. 1993); see *Simms*, 914 F.3d at 249 & n.13 (collecting cases); *infra* pp. 26–27, 29–30, 31. In any context, past or present, "the use of the term 'by its nature' ... mandates a categorical approach." *United States* v. *Rogers*, 371 F.3d 1225, 1228 n.5 (10th Cir. 2004).

Moreover, the government's fact-specific reading of "by its nature" deprives this statutory phrase of any meaning. The government asserts that a jury must consider the "nature" of "the defendant's particular conduct." Br. 30. But an individual defendant's "particular conduct" on one occasion has no "normal and characteristic" or "inherent features." There are simply the facts of the defendant's actions. Cf. § 3553(a)(1)

(treating an offense's "nature" and "circumstances" as distinct concepts). Thus, reading "by its nature" to refer merely to the defendant's conduct renders this language superfluous. With or without "by its nature," the court would simply focus on the facts of the defendant's crime. *Simms*, 914 F.3d at 242.

The observation that "[t]wo violations of the same criminal statute can have very different natures" (Br. 31), does not help the government. That is just another way of saying that two different violations of a law can have very different *facts*, which simply underscores that the government's reading of "by its nature" does no work. The government's interpretation thus violates the "axiomatic" rule against surplusage: All of a statute's language must be given effect. *Corley* v. *United States*, 556 U.S. 303, 314 (2009). Indeed, all but one of the jury instructions the government cites—in an attempt to show that its fact-specific approach is workable—*omit* the phrase "by its nature" in describing the offense, and the last makes no effort to explain it. Add. 3a, 8a, 12a, 16a–17a. One set of instructions actually replaces "by its nature" with "as committed." *Id.* at 3a. This further confirms that, under the government's reading, "by its nature" has no meaning.

The government tries to solve this problem by suggesting that "the focus on the 'nature' of the crime has the practical effect of limiting the jury's inquiry to the *offense*, rather than the *offender*, or any other extraneous considerations." Br. 31. Thus, evidence of prior violent crimes or acts—or evidence of a "peaceful nature"—is not part of the inquiry. *Id.* But the risk inquiry is already limited to "the course of committing" the "offense that is a felony." See *Dimaya*, 138 S. Ct. at 1218–19. No more language is needed to preclude extraneous considerations, or to exclude evi-

dence that our legal system generally treats as "not admissible." See Fed. R. Evid. 404(a)(1), (b)(1). And again, if "by its nature" really "limit[ed] the jury's inquiry" under the fact-specific approach (Br. 31), presumably this phrase would not have been left out of the government's jury instructions.

c. The categorical reading also finds support in § 924(c)(1)(A), which outlines the elements of a § 924(c) violation. It refers expressly to "a crime of violence ... *that provides for* an enhanced punishment if committed by the use of a deadly or dangerous weapon or device." § 924(c)(1)(A) (emphasis added). "This phrasing would make no sense under a conduct-specific definition of 'crime of violence,' as only statutes, not conduct-specific facts, can 'provide[ ] for' an amount of punishment." *Simms*, 914 F.3d at 242 & n.7 (alteration in original).

It is no surprise that § 924(c)(1)(A) uses categorical language. The other two types of § 924(c) predicates—drug-trafficking crimes and elements-based crimes of violence—are identified categorically. Br. 21, 26. It would be strange for Congress to draft a three-prong statute that uses categorical language throughout—including to describe all three prongs and the offense itself—if it intended one prong to require a fact-specific reading. Indeed, "we cannot forget that we ultimately are determining the meaning of the term 'crime of violence.' The ordinary meaning of this term, combined with [§ 924(c)(3)'s] emphasis on the use of physical force against another person (or the risk of having to use such force in committing a crime), suggests a *category of violent, active crimes* ...." *Leocal*, 543 U.S. at 11 (emphasis added). The statute's surrounding language thus counsels against a "circumstance-specific" reading of the residual clause, under which *any* federal felony could be a "crime of violence"

based on "'the specific way' in which [that] crime was committed" rather than the "nature" of the offense itself. Br. 20.

d. The § 924(c) residual clause also omits the specific references to real-world facts and circumstances that Congress typically uses to instruct courts to assess risk based on the case's facts. "If Congress had wanted judges to look into a felon's actual conduct, 'it presumably would have said so; other statutes, in other contexts, speak in just that way.'" *Dimaya*, 138 S. Ct. at 1218 (plurality); see, *e.g.*, § 2332b(a)(1)(B) (punishing "[w]hoever, involving conduct transcending national boundaries ... creates a substantial risk of serious bodily injury ...."). The Court "usually 'presume[s] differences in language like this convey differences in meaning.'" *Wis. Cent. Ltd.* v. *United States*, 138 S. Ct. 2067, 2071 (2018).

This lack of fact-specific language also distinguishes *Nijhawan* and *Hayes*. See Br. 26–27. The government points out that both cases construed statutes that used the word "offense" to require a fact-specific inquiry. *Id.* That is not quite right. *Nijhawan* interpreted an immigration statute addressing offenses "involv[ing] fraud or deceit in which the loss to the victim or victims exceeds $10,000." 557 U.S. at 38 (emphasis omitted) (quoting 8 U.S.C. § 1101(a)(43)(M)(i)). *Hayes* construed a criminal statute addressing offenses that had certain elements and were "committed by" a particular set of people with specified relationships to the victim. 555 U.S. at 424 (quoting 25 U.S.C. § 2803(3)(C)). As the Court construed these laws, both required a hybrid inquiry: The *Hayes* statute required that any covered offense have a certain "element," and the *Nijhawan* statute applied only to "fraud or deceit" offenses. Those are both abstract, categorical inquiries. The question in

those cases was whether the statutes' *additional* qualifying language required a fact-specific inquiry as to that requirement alone. See *Nijhawan*, 557 U.S. at 34; *Hayes*, 555 U.S. at 421. But no such qualifying language is found here. *Simms*, 914 F.3d at 244–45. And only a categorical reading gives effect to § 924(c)'s full text—especially "by its nature," which did not appear in the statutes discussed in *Nijhawan* and *Hayes*.

e. The government's other statutory arguments are unavailing. The government explains at length that juries are "well-positioned" to determine risk. Br. 20–25. Thus, the government says, "Section 924(c)(3)(B)'s 'substantial risk' requirement suggests a jury question." Br. 20. But the fact that juries *can* make such assessments does not mean every reference to risk is an invitation for a jury trial. This Court has repeatedly interpreted similar or identical language to require *judges* to gauge risk, and the government cannot contend that § 924(c)'s language is any more suggestive of a jury question. That other, differently worded laws require juries to "gaug[e] the riskiness of conduct" (Br. 23) is irrelevant. The question is whether Congress required the same inquiry here, and § 924(c)'s language shows that it did not.

The government's reliance on the word "involves"—"that by its nature, *involves* a substantial risk"—is equally misplaced. The word "involves" no more "supports a circumstance-specific approach" here (Br. 27) than it did in the ACCA's residual clause or § 16(b), which both use the word "involves" "identically." *Dimaya*, 138 S. Ct. at 1216–17 (plurality). The government observes that *Taylor* "pointed to the word's *absence* as one reason to adopt a categorical, rather than circumstance-specific, approach" to identifying a prior *burglary* conviction. Br. 29. But "involves" did

not give the Court pause in construing the ACCA's residual clause and § 16(b) to require an ordinary-case categorical approach, *e.g.*, *James*, 550 U.S. at 208; *Leocal*, 543 U.S. at 7, and those holdings are far more relevant.

If anything, the residual clause's present-tense use of such abstract language—"*involves* a substantial risk that physical force against the person or property of another *may be* used"—suggests a categorical inquiry. Compare this language with a bill pending in Congress, which would amend § 924(c)'s residual clause by striking "by its nature," replacing "involves" with "based on the facts underlying the offense, involved," and replacing "may be used" with "may have been used." H.R. 7113, 115th Congr. (2d. Sess. 2018). *This* kind of fact-specific language—absent from the actual statute—would be needed to permit the government's reading.

Finally, the phrase "in the course of committing the offense" does not help the government. The government argues that this phrase suggests a focused inquiry into "the defendant's *own* violation of a legal prohibition, rather than just the legal prohibition in the abstract." Br. 26. The problem with this argument is the same as when the government raised it in *Dimaya:* The phrase "in the course of committing the offense" simply "excludes ... a court's ability to consider the risk that force will be used after the crime has entirely concluded." 138 S. Ct. at 1218–19. It does not change the approach: "In the ordinary case, the riskiness of a crime arises from events occurring during its commission, not events occurring later." *Id.* at 1219. And this is not the "focus[]" of the residual clause (Br. 26); the "offense that is a felony" is.

At bottom, each word or phrase the government invokes—except "by its nature"—*might* be susceptible,

by itself, to a fact-specific reading. But § 924(c) uses all of these terms together. And this Court has twice construed this same language categorically.

2. The Court has twice interpreted § 16(b)'s identical language to unambiguously require an ordinary-case categorical approach.

Even if the text alone did not mandate an ordinary-case categorical approach, "[t]his Court's precedents interpreting identical statutory language [would] positively compel that conclusion." *Merrill Lynch*, 136 S. Ct. at 1567. This Court has twice read § 16(b), which the government admits is "materially identical" to § 924(c)'s residual clause (*Dimaya* U.S. Br. 53), to unambiguously require an ordinary-case categorical analysis. Those decisions apply fully here. As the government originally told the Fifth Circuit, there is "no reasoned basis" to distinguish "precisely the same language" in § 16(b) and § 924(c). U.S. 5th Cir. Br. 24.

Leocal unanimously adopted the ordinary-case categorical approach for § 16(b). The Court emphasized the same textual features discussed above, explaining that the phrases "*any other offense*" and "*by its nature*" "require[ ] us to look to the elements and the nature of the offense of conviction, rather than to the particular facts [of the defendant's] crime." 543 U.S. at 7. Indeed, *Leocal* "considered [§ 16(b)] clear and unremarkable." *Dimaya*, 138 S. Ct. at 1235 (Roberts, C.J., dissenting); see *Leocal*, 543 U.S. at 11 n.8 (noting the statute's lack of "ambiguity"). That is unsurprising, since the courts of appeals and the government had long read this language to require a categorical approach wherever it appeared. Br. 22; *infra* pp. 26–27, 29–30, 31.

Dimaya confirms *Leocal*'s reading of this language. Even "more so" than the ACCA residual clause, § 16(b) "demands a categorical approach." 138 S. Ct. at 1217 (plurality). *Dimaya* again pointed to the same textual characteristics: Words like "felony" and "offense "are 'read naturally' to denote the 'crime as *generally* committed,'" and "the words 'by its nature' in § 16(b) make that meaning all the clearer" by "tell[ing] courts to figure out what an offense normally—or, as we have repeatedly said, 'ordinarily'—entails, not what happened to occur on one occasion." *Id.* at 1217–18. This reading is also confirmed by "the absence of terms alluding to a crime's circumstances, or its commission." *Id.* "The upshot of all this textual evidence is that § 16's residual clause—like ACCA's, except still more plainly—*has no 'plausible' fact-based reading*." *Id.* (emphasis added).

Both decisions built on *Taylor* v. *United States*, which first applied the categorical approach to the ACCA's enumerated offense of "burglary." 495 U.S. 575, 600 (1990). *Taylor* noted that Congress considered adopting for the ACCA the same "crime of violence" definition that § 924(c) uses, *id.* at 583, and emphasized that "[e]ach of the proposed versions of the 1986 amendment"—including this one—"carried forward th[e] categorical approach," *id.* at 589. *Leocal* was then followed by *James*, which applied the ordinary-case categorical approach to the ACCA's residual clause, reiterating that "the proper inquiry is whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another." 550 U.S. at 208.

Because § 924(c)'s language is the same as § 16(b)'s, this Court should interpret both provisions the same way. "[W]hen Congress uses the same language in two statutes having similar purposes, particularly

when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." *Smith* v. *City of Jackson*, 544 U.S. 228, 233 (2005). That principle applies with full force here. Apart from a comma before "by its nature," § 16(b) is exactly the same as § 924(c)'s residual clause. "The relevant statutory phrases, moreover, play an identical role in the structure common to [both] statutes ...." *Tex. Dep't of Hous. & Cmty. Affairs* v. *Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2519, (2015). And these two provisions share not only language, but also lineage. As explained next, they are identical twins, enacted at the same time to serve the same function.

B. The statute's history confirms that Congress intended a categorical approach.

Section 924(c)'s and § 16(b)'s shared history shows that Congress (1) intended both of these twin provisions to apply categorically, and (2) has accepted the court of appeals' three-decade-old consensus that § 924(c) requires a categorical approach.

1. Congress intentionally conjoined, not separated, § 16 and § 924(c).

Congress first enacted § 924(c) in 1968. Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1213, 1223–24. At the time, § 924(c) contained neither a definition of "crime of violence" nor a residual clause; instead, it criminalized using a firearm to commit, or unlawfully carrying a firearm while committing, a federal felony. *Id.*

That changed in the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837. Three aspects of that law are relevant. First, Congress created the earliest version of the ACCA. *Id.* § 1801, 98 Stat. at 2185. Second, Congress created a general def-

inition of "crime of violence" in § 16, and repeated it in the Bail Reform Act. That definition was the same as the current one. Third, Congress narrowed § 924(c) to apply only to this new category of "crime[s] of violence." *Id.* § 1001(a), 98 Stat. at 2136; see S. Rep. No. 97-307, at 888 (the bill would "narrow[ ]" § 924(c) by "limiting the offenses with which the display, use, or possession of a firearm must be associated to crimes of violence rather than any felony"). "These limitations ... [were] designed to refine the offense by confining it to its proper and practical boundaries as a means of deterring and punishing the employment of a firearm in relation to an offense that, by its nature, involves physical force or a substantial risk thereof." S. Rep. No. 97-307, at 889. But Congress did not define "crime of violence" in § 924(c). Instead, § 924(c) cross-referenced § 16's definition. See Pub. L. No. 98-473, § 1001(a), 98 Stat. at 2136; S. Rep. No. 98-225, at 307 (1983).[3]

Thus, from inception, the definitions of "crime of violence" in § 924(c) and § 16 were conjoined by cross-reference, created in the same bill to serve the same function. And these changes were part of the same law that first created the ACCA, the legislative history of which "shows that Congress generally took a categorical approach to predicate offenses." *Taylor*, 495 U.S. at 601. The government, by contrast, points to nothing in the legislative history suggesting that

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3 The government quotes the 1981 Senate Judiciary Committee Report's use of the phrase "dangerous criminal conduct," Br. 35, but that snippet comes from the section of the report describing "Present Federal Law," which referred to the earliest version of § 924(c). S. Rep. No. 97-307, at 887–88. That pre-amendment version applied to any federal felony and did not use the term "crime of violence." *See id.*

Congress contemplated juries identifying predicate offenses.

At the time, the multi-purpose "crime of violence" definition referred mainly to contemporaneous offenses. For example, the Bail Reform Act required (and still requires) a district court to hold a hearing before releasing a defendant "in a case that involves ... a crime of violence." § 3142(f)(1)(A). Similarly, the Attorney General could certify a juvenile for adult prosecution where "the offense charged is a crime of violence that is a felony." Pub. L. No. 98-473, § 1201(a), 98 Stat. at 2150 (amending § 5032). And various criminal statutes incorporated the definition as an element of a present offense. Section 929 punished using or carrying a gun "loaded with armor piercing ammunition" during a crime of violence, *id.* § 1006(a), 98 Stat. at 2139, and § 1952A prohibited racketeers from "threaten[ing] to commit a crime of violence against any individual," *id.* § 1002(a), 98 Stat. at 2137.

The lower courts quickly converged on a categorical reading of these provisions. True, the government "argued in several Section 924(c) cases" in 1985 and 1986 that § 16(b) "required a circumstance-specific approach." Br. 36. But those arguments failed. The courts instead held that § 16(b)'s language, "including the phrase 'by its nature,' prevents us from adopting a case-by-case analysis." *United States* v. *Cruz*, 805 F.2d 1464, 1469 (11th Cir. 1986); see also *United States* v. *Meyer*, 803 F.2d 246, 249 (6th Cir. 1986) (adopting a categorical reading because "Section 924(c) applies to an offense that 'by its nature' involves a substantial risk of physical force"); *United States* v. *Chimurenga*, 760 F.2d 400, 404 (2d Cir. 1985) (same, for the Bail Reform Act); *United States* v. *Bushey*, 617 F. Supp. 292, 299 (D. Vt. 1985) ("Sec-

tion 16(b), in defining crimes of violence, speaks of crimes that *by their nature* involve a substantial risk of harm, not crimes which involve such a risk when conducted in a particular manner."). On that basis, the courts held that drug offenses were not crimes of violence. *E.g.*, *United States* v. *Diaz*, 778 F.2d 86, 88 (2d Cir. 1985) (per curiam) ("While the traffic in drugs is often accompanied by violence, it does not by its nature involve substantial risk that physical violence will be used.").

Responding to these decisions, Congress in 1986 expanded § 924(c) to include "drug trafficking crime[s]" as a separate category of predicate offenses. Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104, 100 Stat. 449, 456–57 (1986); see 132 Cong. Rec. E1390-02 (1986) (discussing the amendment as a response to *Diaz* and similar cases); 131 Cong. Rec. S16903-03 (1985) (same). Unlike with crimes of violence, there was no general definition of "drug trafficking crime" in the U.S. Code, so Congress had to create one in § 924(c). 100 Stat. at 456–57. Then, rather than have one definition and one cross-reference, Congress copied § 16's "crime of violence" definition into § 924(c), creating the current § 924(c)(3). See *id.* There have been no more changes to the definition of "crime of violence"—in § 924(c), § 16, the Bail Reform Act, or any other statute—since.[4]

The government's conclusion from this history—that "Congress intentionally separated Section

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4 The government emphasizes the 1983 Senate Report's description of the residual clause as reaching "any felony which carries a substantial risk of such force." Br. 36. But the word "carries" is more suggestive of a categorical approach than a factual one. *E.g.*, *Dean* v. *United States*, 137 S. Ct. 1170, 1174 (2017) (§ 924(c)'s "separate firearm offense carries a mandatory minimum sentence").

924(c)(3)(B)'s subsection-specific definition of 'crime of violence' from" § 16's identical definition (Br. 34)—is exactly backwards. Yes, Congress abrogated the early decisions that applied a categorical approach to exclude drug trafficking from § 924(c)'s scope. Br. 36–37. But rather than change the definition of "crime of violence" to reject the courts' categorical reading, Congress added a separate provision to reach drug offenses and *retained* the existing "crime of violence" definition verbatim (minus a comma). It simply moved the operative definition from § 16(b) directly into § 924(c), lock, stock, and barrel.

It would be bizarre for Congress to "intentionally separate" the meaning of two previously cross-referenced statutes by copying the text of one into the other. If Congress thought the courts' interpretation of § 16(b) should not apply to § 924(c), the natural response would be to give § 924(c) different language. Instead, it borrowed § 16's existing language for § 924(c), knowing that this language had been interpreted categorically. This "repetition of the same language in a new statute indicates" Congress's "intent to incorporate" the existing "judicial interpretations as well." *Jerman*, 559 U.S. at 590 (holding that when "Congress copied verbatim" the language of TILA's bona-fide-error defense into the FDCPA, it incorporated the interpretation adopted by "three Federal Courts of Appeals"). Language "transplanted from ... other legislation ... brings the old soil with it." *Sekhar* v. *United States*, 570 U.S. 729, 733 (2013) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)).

2. Congress has accepted the courts of appeals' three-decade consensus that § 924(c) applies categorically.

The government's historical argument also neglects the intervening three decades, during which the lower courts continued to apply § 924(c)'s residual clause categorically. From 1984 until last year, "the considered circuit consensus [was] that § 924(c)(3)(B) requires an ordinary-case categorical approach." *Simms*, 914 F.3d at 249. In fact, prior to *Dimaya*, every circuit to address the issue had applied a categorical approach, often for many years. See *id.* at 249 & n.13 (collecting cases); *United States* v. *Butler*, 496 F. App'x 158, 161 & n.4 (3d Cir. 2012); *United States* v. *Jackson*, 865 F.3d 946, 952 (7th Cir. 2017), *vacated*, 138 S. Ct. 1983 (2018).

Yet Congress has never changed § 924(c)'s residual clause, or any part of its "crime of violence" definition. That is true even though Congress has not been shy about correcting "drafting problems and [judicial] interpretations" of § 924(c) with which it disagrees. See S. Rep. No. 98-225, at 312 (1983). As recently as December 2018, Congress adopted a "clarification of Section 924(c)" in response to how courts and prosecutors were stacking § 924(c) counts. First Step Act of 2018, Pub. L. No. 115-391, § 403 (capitalization omitted). But the residual clause remains the same—and Congress has reused the same language in other contexts, including the federal three-strikes law, § 3559(c)(2)(F)(ii), and for block-grant programs, 34 U.S.C. §§ 10596(2)(B), 10613(b)(2), 10651(a)(8).

Given "the well-nigh unanimous view of the federal courts reiterated for over thirty years," during which time § 924(c) "was amended [often] without alteration of the" residual clause, it is clear that "the construction adopted by the courts has been acceptable to the

legislative arm of the government." *Manhattan Props., Inc.* v. *Irving Tr. Co.*, 291 U.S. 320, 336 (1934). The "very strength of this consensus is enough to rule out any serious claim of ambiguity, and congressional silence after years of judicial interpretation supports adherence to the traditional view." *Gen. Dynamics Land Sys., Inc.*, 540 U.S. at 593–94 (relying on lower courts' "virtually unanimous accord").

C. The categorical approach applies equally in the present-offense context.

The government nevertheless argues that § 924(c) should be interpreted differently from § 16(b) because, unlike § 16(b), § 924(c) "applies only to the conduct for which the defendant is currently being prosecuted." Br. 14. That argument fails.

1. The government's position stretches the principle of contextual interpretation too far. Context surely matters; even "identical language may convey varying content" based on context. *Yates* v. *United States*, 135 S. Ct. 1074, 1082 (2015) (plurality). But that principle has limits. "Up" cannot mean "down," no matter the context. And the 34-word residual clause is not the sort of "utterly unremarkable phrase" Congress often uses to mean different things in different contexts. See *Kwai Fun Wong*, 135 S. Ct. at 1634; *Yates*, 135 S. Ct. at 1082 (plurality) (collecting examples of short phrases the Court has construed differently based on context, like "age," "employee," and "arising under"). The residual clause's language appears just eight times in the U.S. Code, always in provisions defining "crime of violence" or related terms like "nonviolent offense" or "violent offender." This detailed statutory provision is not a "chameleon" that "must draw its meaning from its context." See *Kucana* v. *Holder*, 558 U.S. 233, 245 (2010). Indeed, the government has not cited a single case where this

Court interpreted identical statutory provisions of this length and detail differently.

2. The government's contextual argument also fails on its own terms. That argument has three components: (1) the categorical approach developed to address practical and constitutional concerns arising in the prior-conviction context; (2) courts then applied that approach under § 924(c) essentially by accident, thanks to the "cross-pollination of circuit law"; and (3) because those concerns are irrelevant here, the categorical approach should give way to the "more workable" fact-based approach. Br. 39–42.

The first two claims fail given the history discussed above. The courts of appeals began applying the categorical approach in § 924(c) cases soon after the 1984 amendments adopted the term "crime of violence." *E.g.*, *Cruz*, 805 F.2d at 1474; *Meyer*, 803 F.2d at 249; *Diaz*, 778 F.2d at 88. They did the same in cases under the Bail Reform Act. *E.g.*, *Chimurenga*, 760 F.2d at 404. And they continued to do so under these statutes and § 16(b) after the 1986 amendments. *E.g.*, *Aragon*, 983 F.2d at 1312; *United States* v. *Springfield*, 829 F.2d 860, 862–63 (9th Cir. 1987), *abrogated on other grounds by United States* v. *Benally*, 843 F.3d 350, 353–54 (9th Cir. 2016)); cf. *United States* v. *Headspeth*, 852 F.2d 753, 759 (4th Cir. 1988). These cases involved the defendant's *present* offense, and thus raised no concerns about classifying prior convictions. And these courts adopted the categorical approach based on "the language of the statute, its legislative history, [and] the structure of the statute as a whole." *Cruz*, 805 F.2d at 1474. Nor was this an innovation: Courts have considered predicate offenses categorically for at least a century. See *United States ex rel. Guarino* v. *Uhl*, 107 F.2d 399, 400 (2d Cir. 1939) (L. Hand, J.).

These cases refute the government's claim that *Taylor* "effectively forestalled" the development of a fact-specific approach under § 924(c). Br. 37. *Taylor* was decided in 1990. By then, the courts of appeals had already applied the categorical approach under every statute in which the residual clause's language appeared, for reasons having little to do with the practical and constitutional concerns the government emphasizes here. Post-*Taylor* cases simply continued the trend. See *Simms*, 914 F.3d at 249 & n.13. Courts "continued to treat precedents under Section 924(c)(3) and Section 16 as interchangeable" (Br. 39) because they *are* interchangeable.

Nor were these cases influenced by interpretations of § 16(b) in the prior-conviction context. Congress did not create the Immigration and Nationality Act's definition of "aggravated felony" until 1988, and did not include the cross-reference to § 16 (at issue in *Dimaya*) until 1990. See Immigration Act of 1990, Pub. L. No. 101-649, § 501(a)(2)–(3), 104 Stat. 4978, 5048. Thus, when Congress "separated" § 924(c) and § 16 in 1986 and for four years thereafter, both statutes applied mainly to present offenses. See *supra* p. 26. And the identical Bail Reform Act provisions have always applied contemporaneously. See § 3142(f)(1)(A). The circuits settled on the categorical approach to § 924(c) because that is what its language requires, not because they were overawed by *Taylor*.

This Court, too, "has always rooted the categorical approach in the statutory language chosen by Congress and consistently defended this approach as a means of effectuating congressional intent." *Simms*, 914 F.3d at 240. *Taylor*, *Leocal*, *James*, and *Dimaya* all emphasized the statutory text, explaining that the "only plausible" reading of such language is to require a categorical analysis. *Taylor*, 495 U.S. at 602; see

also *Dimaya*, 138 S. Ct. at 1217 (plurality) ("§ 16(b)'s text creates no draw: Best read, it demands a categorical approach."); *James*, 550 U.S. at 207–08 (the ACCA's "residual provision speaks in terms" that require an "ordinary case" inquiry); *Leocal*, 543 U.S. at 7 ("This language requires us to look to the elements and the nature of the offense of conviction[.]"). That is, the Court's "decisions have consistently understood *language* in the residual clauses of both ACCA and § 16 to refer to 'the statute of conviction, not to the facts of each defendant's conduct.'" *Dimaya*, 138 S. Ct. at 1217 (plurality) (emphasis added).

True, *Dimaya* noted practical and constitutional issues that would arise from a fact-specific approach to past offenses under § 16(b). *Id.* at 1216–17. But *Leocal* did not. 543 U.S. at 7. It instead adopted the categorical approach, for both past offenses and present ones, based on § 16(b)'s language. See *id.* at 7 & n.4, 11 n.8 (noting § 16's present-offense applications and the statute's lack of ambiguity); *e.g.*, § 842(p) (distribution of information relating to explosives in furtherance of a crime of violence); § 1959 (threats to commit crimes of violence in aid of racketeering activity).

The practical and constitutional concerns the government stresses are thus additional reasons—on top of the statutory text, structure, and history—to *reject a fact-specific approach to prior convictions*. They are not why the categorical approach was adopted in the first place.

3. The government's ultimate claim—that the categorical approach just isn't needed under § 924(c)—fails as well. It is not for the government or the courts to rewrite Congress's enactments to suit their policy preferences. *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017). But even setting

that principle aside, the government is mistaken. The categorical approach serves the important purpose "of limiting the statute's penalties to specific classes of federal crimes where the use of a firearm is especially dangerous." *Simms*, 914 F.3d at 247.

As explained above, § 924(c) originally criminalized the use of a firearm in conjunction with any federal felony. But in 1984, Congress "narrow[ed]" the statute's scope (while greatly increasing its penalties) to reach only "crime[s] of violence" rather than "any felony." S. Rep. No. 97-307, at 888; *supra* p. 25. The government's fact-based approach would undo Congress's decision by again allowing "any felony" to serve as a § 924(c) predicate—regardless of the "nature" of the offense—so long as the jury could find the requisite risk based on "the specifics of" the case. Br. 20. Those specifics will necessarily include the presence of a gun, which will greatly increase the odds of an affirmative risk finding. Likewise, the government's reading would render Congress's 1986 addition of "drug trafficking crime[s]" largely redundant, since any drug offense could be a "crime of violence" based on its specific facts.

This is yet another reason courts adopted the categorical approach after 1984: A fact-specific approach "would make any felony a 'crime of violence' simply because a firearm was present." *Meyer*, 803 F.2d at 249. "Had Congress so intended, it could easily have applied § 924(c) to all felonies [again]." *Id.* Since it did not, courts should not "judicially repeal the 1984 and 1986 congressional amendments to § 924(c)." *Simms*, 914 F.3d at 247.

To avoid this problem, the government has elsewhere suggested that jurors could be "instructed not to find a crime of violence based *solely* on the presence of a firearm." *Id.* at 247–48. But it has not of-

fered that proposal here, and not one of its example jury instructions contains any such directive. Regardless, this is not a solution. The presence of a gun in combination with *any* other facts could still establish a crime of violence under this proposal.

Moreover, the modern statute's nexus requirement is much broader than the original. Until 1984, the statute punished using a gun to commit, or unlawfully carrying a gun during, a federal felony. Pub. L. No. 90-618, § 102, 82 Stat. at 1223–24. Now, it punishes using or carrying a gun "during and in relation" to a predicate offense *or* possessing a gun "in furtherance of" that offense. § 924(c)(1)(A). The upshot is that even lawful gun possession could (under the government's view) trigger liability under § 924(c), so long as the prosecutor could identify some nexus between the possession and a felony, even a typically nonviolent one. That is a fundamentally different regime from the one Congress created in 1984. And it is not "more workable" (Br. 42) than the categorical approach.

4. Other statutes provide still more evidence that the categorical approach applies equally in the present-offense context. The Bail Reform Act's "crime of violence" inquiry is necessarily categorical, since the statute requires a threshold "crime of violence" determination before the court has even held a hearing. See § 3142(f)(1)(A); *Singleton*, 182 F.3d at 11. So too the statute requiring the Bureau of Prisons to provide written notice of the release of certain prisoners, including those "convicted of ... a crime of violence (as defined in section 924(c)(3))." § 4042(b)(3). This provision does not merely use § 924(c)'s language, but actually cross-references it. And this must be a categorical inquiry; prison officers cannot feasibly reconstruct the facts of every defendant's crime to deter-

mine whether the notification obligation attaches. Finally, "Congress, through § 16, has also applied the categorical approach to many other statutes that similarly involve contemporaneous prosecutions." *Simms*, 914 F.3d at 246; *e.g.*, § 25(b) (intentionally using a minor to commit a crime of violence); § 119(a) (releasing confidential information to threaten or incite a crime of violence). All of this shows that when Congress uses this language—in any context—it requires a categorical approach. If the approach needs to be changed, that change must come from Congress.

II. CONSTITUTIONAL AVOIDANCE CANNOT JUSTIFY A FACT-SPECIFIC APPROACH.

"The canon of constitutional avoidance 'comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction.'" *Jennings*, 138 S. Ct. at 842. "In the absence of more than one plausible construction, the canon simply has no application." *Id.*; see *Clark*, 543 U.S. at 385.

For all the reasons above, the government's reading of § 924(c)'s residual clause is not plausible or fairly possible. Precedent confirms the point. *Leocal* noted unanimously that this same language contains no ambiguity. 543 U.S. at 7, 11 n.8. And *Dimaya* reiterated that it "has no 'plausible' fact-based reading." *Dimaya*, 138 S. Ct. at 1218 (plurality); see *id.* at 1232 (Gorsuch, J., concurring in part and concurring in the judgment) ("[O]ur precedent seemingly requires this [categorical] approach ...."). If avoidance could not save § 16(b), it cannot save § 924(c)'s residual clause either.

The government nevertheless argues that avoidance requires a fact-specific approach "even if [that] approach [is] not the best reading of the statutory

text." Br. 45. According to the government, that novel construction is necessary to avoid a vagueness holding, which (in its telling) would lead to drastic consequences. *Id.* at 48–53. But avoidance does not allow the Court to rewrite a criminal statute. The consequences of a vagueness holding will be limited, but the government's approach would greatly expand its ability to use the statute's severe mandatory penalties at the expense of fairness, predictability, and congressional intent.

A. Striking down the § 924(c) residual clause will not impair the government's ability to secure lengthy sentences for violent offenders.

This Court has rejected the avoidance gambit twice before. *Dimaya*, 138 S. Ct. at 1217–18 (plurality); *id.* at 1232 (Gorsuch, J., concurring in part and concurring in the judgment); *Johnson*, 135 S. Ct. at 2561–62. To justify a different outcome here, the government warns of "severe practical consequences" if § 924(c)'s residual clause is invalidated: "some of the most violent criminals on the federal docket" will escape punishment or be "immediately released from prison." Br. 49, 52. These dire warnings are overblown.

Invalidating the residual clause will almost never save a defendant from severe punishment. Indeed, striking down the clause will not even save many defendants from liability *under § 924(c)*. The government gravely observes that "more than 3,000 defendants were charged with a §924(c) violation" in the last year—but that figure includes defendants who were never convicted of that offense, as well as defendants convicted of possessing guns in furtherance of drug-trafficking crimes. Of the 1,976 defendants convicted under § 924(c) in fiscal year 2016, for example,

around half committed drug crimes. See U.S. Sentencing Comm'n, *Mandatory Minimum Penalties for Firearms Offenses in the Federal Criminal Justice System* 21, 23 (Mar. 2018). Those charges, convictions, and sentences will not be affected by this case at all.

Most of the remaining defendants are covered by § 924(c)'s *elements* clause, which captures typically violent crimes like robbery or carjacking. See, *e.g.*, *United States* v. *Kundo*, 743 F. App'x 201, 203 (10th Cir. 2018) (collecting carjacking cases); *United States* v. *Gooch*, 850 F.3d 285, 292 (6th Cir. 2017) (Hobbs Act robbery); *United States* v. *Armour*, 840 F.3d 904, 909 (2d Cir. 2016) (bank robbery). Elements-clause offenders, like drug offenders, will still be culpable under § 924(c) without the residual clause. And even where the government charges the use or possession of a firearm in connection with a conspiracy, the case—as here—often also involves a completed substantive offense that would satisfy the elements clause. See *Simms*, 914 F.3d at 232–33. In such cases, the residual clause merely provides an alternative basis for the first § 924(c) conviction, or opens the door to an additional conviction that increases the already severe minimum punishment and further reduces a district court's sentencing discretion.

A holding for Respondents will not have a significant effect even in those cases where only the residual clause applies. A § 924(c) defendant is, by definition, "subject to punishment for" the predicate offense. *Rodriguez-Moreno*, 526 U.S. at 280; Br. 19. And the sentence for that predicate offense must account for both the "nature" *and* the "circumstances" of the crime, see § 3553(a)(1), "which will necessarily include whether the offender used a firearm," *Simms*, 914 F.3d at 253.

Thus, in many cases cited by the government, the district court could impose the same aggregate punishment even without § 924(c). In *Simms*, for example, the defendant pleaded guilty to conspiracy to commit Hobbs Act robbery and was convicted under § 924(c) of brandishing a firearm in connection with that conspiracy. 914 F.3d at 232–33. The court selected an aggregate sentence for both counts of just over 16.5 years. *Id.* at 252. By itself, the conspiracy count carries a 20-year maximum penalty. § 1951(a). The government's other cases are similar. See Opening Brief of Appellants 4, *United States* v. *Eshetu*, 898 F.3d 36 (D.C. Cir. 2018) (No. 15-3020), 2016 WL 6563427, at *4 (aggregate sentence of 224 months for conspiracy and § 924(c)); *United States* v. *Salas*, 889 F.3d 681, 683 (10th Cir. 2018) (additional convictions under §§ 842(i), 844(n), and 844(i) would authorize the same 35-year total sentence), *petition for cert. filed*, No. 18-428 (Oct. 3, 2018); *United States* v. *Jenkins*, 849 F.3d 390, 393–94 (7th Cir. 2017) (court imposed a 25-year, 8-month term of imprisonment; kidnapping, § 1201(a), allows a life sentence), *vacated on other grounds*, 138 S. Ct. 1980 (2018).

Indeed, "where § 924(c) convictions are invalidated"—whether on direct or collateral review—"the government routinely argues that an appellate court should vacate the entire sentence so that the district court may increase the sentences for any remaining counts up to the limit set by the original aggregate sentence. And appellate courts routinely agree." *Dean* v. *United States*, 137 S. Ct. 1170, 1176 (2017) (citation omitted). Where the government does not secure a conviction under § 924(c), the advisory Sentencing Guidelines typically recommend a longer sentence on the predicate crime. See U.S. Sentencing Guidelines Manual § 2K2.4 cmt. 4. (2018). And of course courts

can upwardly vary from the guidelines if appropriate. In this very case, the government agrees that the district court should conduct a complete resentencing if Count Two remains vacated. Response of the United States to Appellants' Petitions for Panel Rehearing at 10. And Respondents' other convictions would allow the same aggregate sentence even without their residual-clause conviction. *Id.*

The true "practical consequence" of striking the § 924(c) residual clause, therefore, will almost never be that a violent offender goes free who would otherwise go to prison. At most, the government will lose its ability—in a small number of cases—to force a sentencing court to impose a longer sentence than the court would otherwise impose under its discretionary sentencing authority. See § 3553(a). Drug-trafficking and elements-clause convictions will be wholly unaffected. In any event, courts do not decide whether to apply or withhold the Constitution's guarantees based on such consequences. *District of Columbia* v. *Heller*, 554 U.S. 570, 636 (2008). And Congress "remains free ... to write a new residual clause that affords the fair notice lacking here." *Dimaya*, 138 S. Ct. at 1233 (Gorsuch, J., concurring).

B. The government's alternative reading expands its power under § 924(c) in unexpected and unjustified ways.

While a vagueness holding will only rarely take § 924(c) off the table, the government's new fact-based approach would expand the crime beyond any predictable boundary. See *supra* pp. 34–35. The government's harmlessness argument illustrates just how broadly it would cast § 924(c)'s net: In the government's view, it was not Respondents' agreement to commit robbery that made the conspiracy violent; it was all the conduct that followed that agreement,

even the attempt to escape while it was raining. Br. 6, 54 (describing and relying on evidence of a car chase under "'[e]xtremely dangerous and wet' conditions"). There is no principled limit to the re-imagined crime.

Prosecutors could convince a jury that *any* felony, even a typically non-violent one, was a "crime of violence" because of "the specific way in which [that] crime was committed." Br. 20. For example, an alien who illegally re-entered the country while carrying a gun to protect himself or his family from cartel violence might, in a prosecutor's view, have committed a "crime of violence." Cf. 8 U.S.C. § 1326(a). The same would be true if he traded that gun, even unloaded, to a smuggler in exchange for passage. Cf. *Smith* v. *United States*, 508 U.S. 223, 238–39 (1993) (exchanging a gun for drugs is a "use" of the gun "during and in relation to" the drug crime). The new risk "element" would be limited only by a prosecutor's imagination and persuasive ability. Unlike any previous incarnation, the crime could now reach a legal gun owner who counterfeits money, § 471, pays or receives a bribe, § 201, shares classified data with the press, see § 798, uses someone else's identity, § 1028, sells bootleg DVDs or fake designer bags, see §§ 2318, 2320, or anything else. The government need only argue that some underlying or extraneous facts made the crime risky, and that the gun helped advance the offense in some way.

This surprising expansion of § 924(c) would make the crime far broader and even less predictable than it is under the current categorical regime. The categorical approach, while fundamentally flawed, at least provides some limits on § 924(c). A defendant who conspired to illegally hunt wildlife and sell the meat in violation of the Lacey Act, 16 U.S.C.

§ 3373(d), can rest easy in the assurance that his hunting rifle will not trigger liability under § 924(c). That assurance would disappear under the fact-based approach.

This unprincipled expansion would run headlong into the fair-notice and arbitrary-enforcement problems a fact-based approach supposedly avoids. See *Kolender* v. *Lawson*, 461 U.S. 352, 357–58 (1983). The threat of § 924(c)'s severe mandatory penalties—particularly the risk of multiple, consecutive sentences—gives prosecutors extraordinary leverage in plea negotiations. Under the government's approach, prosecutors would retain that leverage for all of the crimes currently covered by the categorical residual clause, since those offenses ordinarily involve a risk of force. The new approach would also reach some marginal offenses—like possession of a short-barrel shotgun—that might or might not qualify under the categorical approach. Compare *Dimaya*, 138 S. Ct. at 1237–38 (Roberts, C.J., dissenting) (explaining why the ordinary case of possessing a short-barreled shotgun might not satisfy § 16(b)), with *United States* v. *Amparo*, 68 F.3d 1222, 1225 (9th Cir. 1995) (reaching opposite conclusion under § 924(c)(3)(B)). But, as a bonus, the government would *extend* § 924(c) and its powerful leverage to every felony prosecution where a gun was found, used, or possessed, even those that are obviously nonviolent under the categorical approach.

Further, because identifying a "crime of violence" would shift from a legal determination to a factual one, defendants would lose the ability to challenge unusual or outlandish invocations of § 924(c) by pretrial motion. Fed. R. Crim. P. 12(b)(1). The only way to know whether a felony is a "crime of violence" would be to try the case before a jury. For all these

reasons, ordinary citizens would be unable to predict which cases would result in § 924(c) liability, and prosecutorial discretion would be virtually limitless.

C. Avoidance is inappropriate because the rule of lenity independently bars the government's construction.

The rule of lenity independently bars a fact-based approach precisely because it would dramatically expand § 924(c)'s reach while making its application in many cases even more uncertain. See *Cleveland* v. *United States*, 531 U.S. 12, 25 (2000) ("[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."); accord *Yates*, 135 S. Ct. at 1088. And where lenity applies, avoidance cannot.

Both lenity and avoidance are tools for addressing ambiguity, and—properly applied—both safeguard the separation of powers. Avoidance does so by presuming that Congress takes the Constitution seriously, *INS* v. *St. Cyr*, 533 U.S. 289, 300 n.12 (2001), and lenity by ensuring that "legislatures and not courts ... define criminal activity," *United States* v. *Bass*, 404 U.S. 336, 348 (1971).

But lenity goes further, serving critical constitutional values where avoidance is agnostic. It safeguards due process by ensuring that laws provide "fair warning" as applied, *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931), and "embodies" a civilized society's "instinctive distaste[] against men languishing in prison unless the lawmaker has clearly said they should," *Bass*, 404 U.S. at 348 (quoting Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, *in* Benchmarks 196, 209 (1967)). Thus, "applying constitutional avoidance to *widen* a statute's reach fails to keep faith with the rule of lenity because it resolves a statutory ambiguity in a manner

contrary to the interests of criminal defendants." *Simms*, 914 F.3d at 257–58 (Wynn, J., concurring); see *id.* at 250–51 (majority); cf. *Cruz*, 805 F.2d at 1474–75 (applying lenity to confirm that drug trafficking was not a § 924(c) "crime of violence").

Indeed, there is some irony in the government's plea to avoid invalidating a criminal law on vagueness grounds by adopting a vastly broader—and in some ways even less predictable—interpretation. Vagueness and lenity are "related manifestations" of the Constitution's fair-warning requirement. *United States* v. *Lanier*, 520 U.S. 259, 266 (1997). The government's proposal would disserve both of these principles at once by reaching many more offenses while reducing the amount of notice provided and increasing the risk of arbitrary enforcement.

Because lenity—like avoidance—requires ambiguity, the Court need not resort to either doctrine here. But as *Leocal* observed of § 16(b)'s identical language, "[e]ven if [the statute] lacked clarity on this point, we would be constrained to interpret any ambiguity in the statute" against the government. 543 U.S. at 11 n.8. Indeed, this would be "a textbook case" for lenity. *Hayes*, 555 U.S. at 436 (Roberts, C.J., dissenting). As the Chief Justice explained, where a statute has either a categorical reading that would apply narrowly, or a fact-based reading that would apply far more broadly, lenity demands the narrower construction unless the "text 'clearly warrants'" the broader one. See *id.* (quoting *Crandon* v. *United States*, 494 U.S. 152, 160 (1990)). There is no serious argument that § 924(c)'s text "clearly warrants" a fact-based approach. Lenity likewise prohibits the government's attempt to construe two identical statutory provisions differently, "lest those subject to the criminal law be misled." *Santos*, 553 U.S. at 523 (plurality).

It is no answer to say that the government's approach is more lenient because it would (hypothetically) give a defendant charged with a categorically violent conspiracy a fact-based escape hatch at trial. Because the Court's lenity-based construction of a statute governs "in future cases," *United States* v. *Thompson/Ctr. Arms Co.*, 504 U.S. 505, 519 (1992) (Scalia, J., concurring); see *United States* v. *Kozminski*, 487 U.S. 931, 951–52 (1988), lenity requires the interpretation that would "generally be more ... lenient" for—and ensure fair notice to—defendants as a class, cf. *Johnson* v. *United States*, 529 U.S. 694, 713 n.13 (2000). Thus, lenity does not favor a narrower construction of a criminal law in a few cases over a far broader construction in the vast majority. See *United States* v. *Sherbondy*, 865 F.2d 996, 1009 n.17 (9th Cir. 1988) (applying lenity to construe the ACCA's residual clause categorically, even though that would "yield a harsher result for a narrow group of potential defendants" who could prove that their specific acts "did not entail the risk of violence," because a narrower categorical reading would further lenity's goals for "the substantial majority of defendants"); cf. Note, *The New Rule of Lenity*, 119 Harv. L. Rev. 2420, 2441 n.112 (2006) ("The Court applies lenity to a statute that criminalizes some innocent conduct even if the specific defendant involved knew that her action was wrongful.").

Lenity therefore bars the government's fact-based approach—whether or not avoidance would otherwise allow it. "[Thirty-five] years in jail is too much to hinge on the will-o'-the-wisp of statutory meaning pursued by the [government]," *Hayes*, 555 U.S. at 437 (Roberts, C.J., dissenting), even if the alternative requires invalidation.

D. Adopting the fact-based approach would offend the separation of powers.

Finally, invoking avoidance here would be inappropriate because it would (1) directly contradict all evidence of Congress's intent and (2) cause an unprecedented judicial expansion of a criminal statute. Applying avoidance in this way would offend the separation of powers.

No amount of textual gymnastics can support the government's position. As Congress wrote it, the residual clause defines a "crime of violence" as:

> [A]n *offense that is a felony* and ... that *by its nature*, involves a substantial risk that physical force against the person or property of another *may be used* in the course of committing the offense.

§ 924(c)(3)(B) (emphasis added). To support the government's interpretation, the statute would have read something like this:

> [A]n offense that is a felony and ... that, *based on the facts underlying the offense, involved* a substantial risk that physical force against the person or property of another *may have been used*.

Congress could have adopted the latter formulation. Indeed, it may yet do so—this language comes from the amendment pending in the House Judiciary Committee. H.R. 7113, 115th Cong. (2d. Sess. 2018). But it is "for Congress, not this Court, to rewrite" the statute along these lines. *Blount*, 400 U.S. at 419. "'[R]ewrit[ing] a law to conform it to constitutional requirements' ... would constitute a 'serious invasion of the legislative domain,' and would "sharply diminish Congress's 'incentive to draft a narrowly tailored law in the first place.'" *United States* v. *Stevens*, 559 U.S. 460, 481 (2010) (omission in original).

Indeed, avoidance is "a means of giving effect to congressional intent, not of subverting it." *Clark*, 543 U.S. at 382. But using avoidance here would turn a canon "followed out of respect for Congress" into a license to disregard Congress's directives. See *Rust* v. *Sullivan*, 500 U.S. 173, 191 (1991). Even setting the plain text aside, Congress embraced the categorical approach when it copied § 16's text into § 924(c), knowing it had been read categorically, and then left it unchanged for three decades while the courts uniformly applied it that way. The government identifies no case where the Court has used avoidance to upset a firmly established, congressionally ratified reading of the statutory text.

Nor can avoidance be justified here by the usual presumption that Congress does not "intend to infringe constitutionally protected liberties." *St. Cyr*, 533 U.S. at 300 n.12. The Court has already held in *Leocal* and *Dimaya* that the 98th Congress intended an unconstitutional reading when it enacted § 16(b), and it would make little sense to presume that the 99th meant anything different when it copied the very same text into § 924(c).

Finally, "applying the doctrine of constitutional avoidance to *expand* the reach of a criminal statute conflict[s] with Congress's exclusive authority to define crimes and punishments." *Simms*, 914 F.3d at 257 (Wynn, J., concurring). The government's proposed reading of § 924(c)'s residual clause would extend the statute to reach any defendants whose specific conduct poses a substantial risk of force. *Supra* pp. 34–35, 40–43. That would be an "unprecedented application" of avoidance. *Id.* at 254. "[C]ases 'paring down' federal statutes to avoid constitutional shoals are legion." *Skilling* v. *United States*, 561 U.S. 358, 406 n.40, 409 n.43 (2010). But no decision has ever

expanded a criminal statute on that basis. *Simms*, 914 F.3d at 256 (Wynn, J., concurring).

There are good reasons for this lack of precedent. It is a bedrock principle that "the legislature, not the Court ... define[s] a crime, and ordain[s] its punishment." *Dowling* v. *United States*, 473 U.S. 207, 214 (1985). "[N]arrowly constru[ing] a broadly worded" statute to avoid constitutional concerns respects that principle, *Lanier*, 520 U.S. at 267 n.6; *Skilling*, 561 U.S. at 409 n.43, because "the conduct proscribed by the limiting construction necessarily falls within the scope of the conduct Congress intended to proscribe," *Simms*, 914 F.3d at 256–57 (Wynn, J., concurring). But the opposite would be true here: Applying avoidance to adopt a "more expansive" interpretation would "entail[] *the judiciary* holding unlawful conduct for which there necessarily is some doubt as to whether Congress intended to make [it] a crime." *Id.* at 257. The Court should reject that unprecedented and unprincipled extension of the avoidance doctrine.

III. EVEN IF THE COURT ADOPTS A NEW CONSTRUCTION OF THE STATUTE, RESPONDENTS' CONVICTIONS CANNOT BE REINSTATED.

The government urges the Court to reinstate Respondents' residual-clause convictions because the district court's failure to submit the substantial-risk "element" to the jury was harmless. Br. 53. Alternatively, it seeks to force Respondents to defend a second trial under the government's new theory. But the government brought about the "errors" of which it now complains. And the incorrect jury instruction is only the tip of the iceberg: even under the government's construction, Respondents suffered multiple overlapping constitutional violations that cannot be found harmless.

A. If the residual clause's "substantial risk" requirement is a conduct-based element, Respondents suffered multiple harmful constitutional violations.

Under the government's new interpretation, the jury must be convinced beyond a reasonable doubt that the predicate offense involved the requisite risk of force. Br. 53. Respondents' jury did not make that finding. *Id.* But the government insists that "the only error in this case was a misinstruction of the jury." U.S. Cert-Stage Reply 6. Not so. If the government's reading is correct, there were additional constitutional violations that resist harmless error analysis.

First, the indictment does not allege that *this* conspiracy "by its nature" involved a "substantial risk" that force would be used. ROA 1152. It merely asserts that the conspiracy was a crime of violence. If substantial risk is a fact-based element, then the grand jury must find and charge it. *United States* v. *Resendiz-Ponce*, 549 U.S. 102, 107 (2007). And even if the indictment's total omission of an element may constitute harmless error, but see *id.* at 116–17 (Scalia, J., dissenting), it cannot do so here. Respondents had "no incentive" or opportunity "to contest" whether the conspiracy itself presented a risk of force, since those facts did "not matter under the law" as everyone understood it. See *Mathis* v. *United States*, 136 S. Ct. 2243, 2253 (2016). Because Respondents had no notice of or opportunity to address the new "element" at trial, the record does not permit a reviewing court to determine harmlessness.

Second, reinstating or retrying the residual-clause convictions under the new theory would constructively amend the indictment. "[A]fter an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself."

Stirone v. *United States*, 361 U.S. 212, 215–16 (1960). The government's reinterpretation of the statute would require prosecution of a different crime than the one charged by the grand jury. That is a structural error. *Id.* at 217.

Third, the government cannot deny that the § 924(c) residual clause was unconstitutionally vague *as applied* below. All parties and the trial judge proceeded on the understanding that the ordinary-case approach controlled, and the "crime of violence" finding was based upon application of an uncertain risk standard to the judicially imagined ordinary case of conspiracy. Now all parties agree that approach is unconstitutional. Even if this Court were to adopt some kind of saving construction for the statute, that would not save Respondents' residual-clause convictions. *Ashton* v. *Kentucky*, 384 U.S. 195, 198 (1966) ("[W]here an accused is tried and convicted under" an unconstitutional interpretation of a statute, "the conviction cannot be sustained on appeal by a limiting construction which eliminates the unconstitutional features of the Act.").

Finally, if the risk posed by this specific conspiracy was an element of § 924(c), the jury charge did not merely *omit* an element; the district court directed a verdict on that element. The court told the jury that the Hobbs Act conspiracy constituted a "crime of violence" as a matter of law. That, too, is structural error. See *Rose* v. *Clark*, 478 U.S. 570, 578 (1986); *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 572–73 (1977); *United Bhd. of Carpenters & Joiners* v. *United States*, 330 U.S. 395, 408–09 (1947).

This case is unlike *Neder* v. *United States*, which held that the omission of an element from a jury charge may be harmless. 527 U.S. 1, 15 (1999). The *Neder* district court merely told the jury that it need

not consider an element. It did not tell the jury to *find* the element, as happened here. And in *Neder*, the defendant understood that he could contest materiality—just to the judge rather than the jury. *Id.* at 14. Here, by contrast, the issue is not just *who* decides, but *what* is to be decided. Respondents had no way of knowing they could contest the riskiness of the conspiracy to anyone.

Finally, even if harmless-error analysis applies, the government's speculation about what the jury might have decided on a different record is unreliable. Most of the evidence the government discusses relates to the commission of the robberies, not the conspiracy. Br. 53–55. And the jury did not share the government's view of events, as shown by Mr. Davis's acquittal on Count Three. ROA 1369. The government thus cannot show that these errors were harmless beyond a reasonable doubt.

B. Respondents would prevail under an always-a-risk approach.

In *Dimaya*, Justice Gorsuch proposed an "alternative reading" under which courts would ask "whether the defendant's crime of conviction *always*" involves "a substantial risk of physical force." *Dimaya*, 138 S. Ct. at 1233 (Gorsuch, J., concurring in part and concurring in judgment). The government has not taken up Justice Gorsuch's invitation, presumably because Respondents would prevail under that approach too. A Hobbs Act conspiracy does not *always* present a substantial risk of force. Cf. Br. 50. The crime is complete upon the formation of an agreement. If an overt act must be proved, it need not be violent. Br. 50 n.5; *e.g.*, *United States* v. *Smith*, 215 F. Supp. 3d 1026, 1034 n.54 (D. Nev. 2016) ("[A] defendant could be convicted based on an agreement to commit the robbery and purchasing a ski mask to conceal his identi-

ty during the planned robbery."). Thus, this offense does not "always" or "automatically" involve a risk of force. Cf. *Dimaya*, 138 S. Ct. at 1233 (Gorsuch, J., concurring in part and concurring in judgment).

C. The government's belated change in position precludes a remedy in its favor.

The government urges the Court to adopt a fact-based reading of the § 924(c) residual clause, rather than driving "straight into the teeth of *Johnson* and *Dimaya*." Br. 47. But that collision has already happened, with the government at the wheel. At every step below, the government asked the courts to apply the ordinary-case categorical approach. The district court complied. Respondents built the trial record on that understanding. The government successfully resisted dismissal, obtained convictions, and defended those convictions by invoking the *Leocal* approach. That means the government cannot restore the conviction through "judicial acceptance of an inconsistent position in a later proceeding." *New Hampshire* v. *Maine*, 532 U.S. 742, 750 (2001).

When Mr. Glover tried to invoke the fact-specific approach earlier in the case, the government again resisted by arguing he invited (and forfeited) any error by joining in the agreed proposed instructions. U.S. 5th Cir. Br. 26–29. However this court interprets § 924(c), the government should not get any relief until it explains why it should be treated any more favorably. See Fed. R. Crim. P. 30(d) ("Failure to object" to jury instructions "in accordance with this rule precludes appellate review, except as permitted under Rule 52(b)."); *Dimaya*, 138 S. Ct. at 1232 (Gorsuch, J., concurring in part and concurring in judgment) ("[N]ormally courts do not rescue parties from their concessions, maybe least of all concessions from a

party as able to protect its interests as the federal government.").

CONCLUSION

Because the Fifth Circuit correctly held the § 924(c) residual clause invalid, the Court should affirm. Alternatively, the Court should affirm because, however the statute is construed, Respondents' convictions cannot stand. At the very least, if the Court adopts the government's reading of the statute, it should vacate the judgment below and remand with instructions for the Fifth Circuit to address Respondents' case-specific arguments about the validity of their convictions.

Respectfully submitted,

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March 14, 2019

ADDENDUM

ADDENDUM A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

S4 16-CR-408(CS)

UNITED STATES OF AMERICA

v.

VIRGINIA BLANCO,

Defendant.

U.S. Courthouse
White Plains, N.Y.
July 16, 2018
9:00 a.m.

Jury Trial Before: HON. CATHY SEIBEL,
United States District Judge

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Official Court Reporter

* * *

[605] place where the firearm was located and had the power and intention to exercise control over the firearm. Mere presence in a place where a firearm is located is not enough. A person need not have physical custody of an object to be in legal possession of it, so long as he or she has the ability to exercise substantial control over an object and the intent to exercise such control, and the firearm is immediately available to him or her. More than one person can have control over the same firearm. The law recognizes that possession may be sole or joint. Control over an object may be demonstrated by the existence of a relationship between one person having the power or ability to control the item, and another person who has the actual physical custody. The person having control "possesses" the firearm because he or she has a relationship with the person who has actual physical custody of the firearm and because he or she can direct the movement or transfer or disposition of the firearm. In addition, an individual may have possession of an item that is not found on his or her person, because the individual has a relationship to the location where the item is maintained. In this manner, for example, a business person may legally possess things that are scattered throughout a number of stores or offices or installations around the country.

The second element that the Government must prove beyond a reasonable doubt is that the Defendant used or [606] carried the firearm during and in relation to a crime of violence, or possessed a firearm

in furtherance of such a crime. An offense qualifies as a crime of violence if you find that the offense, as committed, involved a substantial risk that physical force may be used against the person or property of another. Before you convict on Count Three, you must find that Count One, Count Two, or both qualify as a crime of violence. The phrase "during and in relation to" should be given its ordinary meaning. "Possessed a firearm in furtherance of a crime" requires both that the Defendant had possession of the firearm – either physically or because it was within her dominion and control – and that such possession helped forward, advance, or promote the commission of the crime, or was an integral part of the crime. The mere possession of the firearm at the scene of the crime is not sufficient under this definition. The firearm must have played some essential part in furthering the crime for this element to be satisfied on the basis of the Defendant's possession of the firearm.

The final element the Government must prove beyond a reasonable doubt for Count Three is that the Defendant knew she was carrying or using a firearm during and in relation to the underlying crime, or that she was possessing a firearm in furtherance of the underlying crime, and that the Defendant acted unlawfully and knowingly in doing so. I have already [607] defined "unlawfully" and "knowingly." To satisfy this element, you must find that the Defendant had knowledge that what she was carrying or using or possessing was a firearm as that term is generally used. The Government must also prove that the Defendant knew what she was doing – that she knew that she was carrying or using a firearm during and in relation to the commission of a crime of violence or possessing a firearm in furtherance of those crimes. It is not necessary, however, for the Government to prove

that the Defendant knew she was violating any particular law.

As with Count Two, the bank robbery count, a defendant may be found guilty of this third count, charging violation of Section 924(c), under an aiding and abetting theory or under a Pinkerton theory, as described in my instructions (at pages 31–32). In addition, I must give you some specific instructions regarding aiding and abetting as it applies to this count only. To convict the Defendant of aiding and abetting the crime charged in Count Three, you must find that the Defendant facilitated either the use, carrying, or possession of the firearm or the commission of the charged violent crime. It is not necessary that the Defendant facilitate both the possession, use, or carrying of the firearm and the underlying crime of violence. To convict the Defendant of this offense on an aiding and abetting theory, you must also find that the Defendant had advance knowledge

* * *

ADDENDUM B

[1] UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT
915 Lafayette Boulevard
Bridgeport, Connecticut

No. 3:17-cr-00065(SRU)

UNITED STATES OF AMERICA,

Government,

v.

HAROLD COOK, *et al*,

Defendants.

August 20, 2018

JURY TRIAL EXCERPT

JURY CHARGE AND CLOSING ARGUMENTS

BEFORE:

THE HONORABLE STEFAN R. UNDERHILL,
U.S.D.J.

Sharon L. Masse, RMR, CRR
Official Court Reporter
915 Lafayette Boulevard
Bridgeport, Connecticut 06604
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* * *

[26] willful and intentional conduct of the defendant. In order to establish that the defendant's conduct resulted in the death of the victim, the government must prove beyond a reasonable doubt that, but for the defendant's actions, the victim would not have died.

Count Two.

Mr. Cook, Mr. Mickens, and Mr. Hunter are all charged in Count Two of the indictment with the firearm-related murder, and with the aiding and abetting in the firearm-related murder, of Mr. Teasley in the course of kidnapping him. The relevant statutes are Title 18, United States Code, Sections 924(c), 924(j)(1), and 1111(a).

Section 924(c) makes it an offense for a person to use or carry a firearm during and in relation to any crime of violence or to possess a firearm in furtherance of a crime of violence.

Section 924(j)(1) makes it an offense to cause the death of a person, including by murder, through the use of a firearm in the course of a violation of Section 924(c).

Section 1111(a) defines murder as the unlawful killing of a human being with malice.

For you to find a defendant guilty of this charged offense, you must be convinced that the government

[27] has proven each of the following elements beyond a reasonable doubt:

First, that the defendant committed a crime of violence. The charged crime of violence in Count Two is kidnapping.

Second, that during and in relation to the commission of kidnapping, the defendant knowingly used or carried a firearm or knowingly possessed it in furtherance of a crime of violence.

Third, that the use of the firearm caused the death of the victim; and

Fourth, that the defendant acted with malice in causing the victim's death.

The first element that the government must establish beyond a reasonable doubt is that the defendant committed a crime of violence. In Count Two the crime of violence is the alleged kidnapping of Mr. Teasley.

You must first determine whether the kidnapping, as alleged in Count One, occurred. In doing so, you should refer to my previous instructions with respect to the first four elements of kidnapping, that is, the taking of the victim, the holding of the victim, the use of an instrument of interstate commerce, and the knowing and willful conduct. If you find that the government satisfied its burden with respect to all four of those [28] elements, then you must next determine whether that kidnapping was a crime of violence, that is, whether it was committed in a way that involved a substantial risk that physical force against the person or property of the victim would be used.

"Physical force" means violent force, force capable of causing physical pain or injury to another person.

"Substantial risk" means that there is a strong probability that the event, in this case the application of physical force during the commission of the crime, will occur. The event, here the physical force, need not actually occur in order for there to be a substantial risk that it may occur.

If you find that the government has proven that the kidnapping as alleged in Count One occurred and that it was committed in a way that involved a substantial risk of physical force against the person or property of the victim, then the government has satisfied the first element here, that the defendant committed the predicate crime of violence.

The second element that the government must establish beyond a reasonable doubt for Count Two is that the defendant knowingly used or carried a firearm during and in relation to the commission of the crime of [29] violence, and/or knowingly possessed a firearm in furtherance of the crime of violence.

A "firearm" is defined as any weapon that will, or is designed to, or may be readily converted to expel a projectile by the action of an explosive.

To satisfy this element, the government must prove that the defendant used, carried or possessed a firearm knowingly. This means that he acted purposefully and voluntarily, and not by accident or mistake. It also means that he knew that the weapon was a firearm, as we commonly use the word. However, the government is not required to prove that the defendant knew that he was breaking the law.

A. The government can satisfy this element by proving that the defendant used and/or carried a firearm during and in relation to the commission of a crime of violence.

In order to prove that the defendant used a firearm, the government must prove beyond a reasonable doubt an active employment of the firearm by the defendant during and in relation to the commission of a crime of violence. This does not mean that the defendant must actually fire or attempt to fire the weapon, although those acts would obviously constitute use of a weapon. Brandishing, displaying, or even referring to the weapon

* * *

ADDENDUM C

[1] UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 15-20652

UNITED STATES OF AMERICA

v.

D-3 EUGENE FISHER
D-4 COREY BAILEY
D-6 ROBERT BROWN II
D-13 ARLANDIS SHY
D-19 KEITHON PORTER

HON. GEORGE CARAM STEEH

JURY INSTRUCTIONS

* * *

[56] COURT'S INSTRUCTION NO. 26

COUNT THIRTY-TWO

POSSESSION OF A FIREARM IN
FURTHERANCE OF A CRIME OF VIOLENCE

(1) Count Thirty-Two of the indictment charges Eugene Fisher, Corey Bailey, Robert Brown II, Arlandis Shy, and Keithon Porter, with violating federal law by possessing a firearm in furtherance of a crime of violence, or aiding and abetting that offense. For you to find a defendant guilty of this crime, you must find

that the government has proved each and every one of the following elements beyond a reasonable doubt:

First: the defendant committed the RICO conspiracy charged in Count One;

Second: the defendant knowingly possessed a firearm;

Third: the possession of the firearm was in furtherance of the RICO conspiracy charged in Count One;

Fourth: at least one of the racketeering acts committed in furtherance of the enterprise involved a substantial risk that physical force may be used against the person or property of another.

(2) Now I will give you more detailed instructions on some of these terms.

(A) The term "firearm" means any weapon which will, or is designed to, or may readily be converted to, expel a projectile by the action of an explosive. The firearm need not be loaded.

[57] (B) The term "knowingly" means voluntarily and intentionally, and not because of mistake or accident.

(C) In order to prove "possession," the government does not necessarily have to prove that a defendant physically possessed the firearm. The law recognizes two kinds of possession—actual possession and constructive possession. Either one of these, if proved by the government, is sufficient.

(D) To establish actual possession, the government must prove that a defendant had direct, physical control over the firearm, and knew that he had control of it.

(E) To establish constructive possession, the government must prove that a defendant had the right

to exercise physical control over the firearm, and knew that he had this right, and that he intended to exercise physical control over the firearm at some time, either directly or through other persons.

(F) For example, if you left something with a friend intending to come back later and pick it up, or intending to send someone else to pick it up for you, you would have constructive possession of it while it was in the actual possession of your friend.

(G) Further, the government does not have to prove that a defendant was the only one who had possession of the firearm. Two or more people can together share actual or constructive possession over property. And if they do, both are considered to have possession as far as the law is concerned.

* * *

ADDENDUM D

[775] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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18 CR 16 (RJS)

UNITED STATES OF AMERICA

v.

AKAYED ULLAH,

Defendant.

New York, N.Y.
November 5, 2018
9:06 a.m.

Before: HON. RICHARD J. SULLIVAN
District Judge, and a Jury

Trial

APPEARANCES

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COLLEEN P. CASSIDY

Also Present:

JOHN MAURER – Special Agent, FBI
MICHAEL DELUCA – Paralegal, U.S. Attorney
JASON T. FISCHER – Paralegal, Federal Defenders
CHIRAAYHU GOSRANI – Paralegal, Federal Defenders

* * *

[946] transportation vehicle when he boarded and rode subway with a destructive device, you must determine whether the subway was carrying at least one passenger or one employee at the time.

With respect to the second theory, that the defendant set off a destructive device with intent to cause death or serious bodily injury, you must determine whether the mass transportation vehicle or vehicles supported by the terminal structure, track, tunnel, station, or facility where the destructive device was set off was or were carrying at least one passenger or employee at the time of the offense.

That sounds a little tricky. You will have the instructions if you need to go through them again. There are two separate interrogatories if and only if you find the defendant guilty on Count Five.

Now Count Six. Count Six of the indictment charges the defendant with using and carrying a destructive device during and in relation to a crime of violence or possessing a destructive device in furtherance of a crime of violence in violation of section 924(c) of Title 18 of the United States Code. To satisfy its burden of

proof with respect to the crime charged in Count Six, the government must establish each of the following two elements beyond a reasonable doubt:

First, that the defendant committed a crime of violence for which he might be prosecuted in a court of the United States; and

[947] Second, that the defendant knowingly used or carried a destructive device during and in relation to the commission of or knowingly possessed a destructive device in furtherance of that crime of violence.

Let me go through these in more detail. The first element that the government must prove beyond a reasonable doubt as to Count Six is that the defendant committed a crime of violence for which he might be prosecuted in a court in the United States. I instruct you that Counts Three and five qualify as crimes of violence within the meaning of this count. So, if you find the defendant was guilty beyond a reasonable doubt of either or both of Counts Three and Five, then the government has met, or satisfied, the first element of this sixth count of the indictment.

Additionally, an offense qualifies as a crime of violence prosecutable in a court of United States if the offense by its nature involved a substantial risk that physical force might be used against the person or property of another. Physical force means force capable of causing physical pain or injury to a person or injury to property.

If you have found the defendant guilty of any of Counts One through Five, you must next determine whether that offense or offenses involved a substantial risk that physical force might be used against the person or property of another. You must consider each

count separately. So only for those [948] counts where you found the defendant guilty beyond a reasonable doubt are you going to do this.

If you previously found that the government proved beyond a reasonable doubt that the defendant is guilty of any of Counts One through Five, and then you find that any of those counts for which you found him guilty qualifies as a crime of violence, then the government has satisfied this first element of Count Six. But you must be unanimous as to which count or counts, if any, involved a substantial risk that physical force might be used against the person or property of another.

To ensure you are unanimous as to which count or counts, if any, involved a substantial risk that physical force might be used against the person or property of another, I am going to ask you to indicate on the verdict form which count or counts you concluded involved a substantial risk that physical force might be used against the person or property of another. That's the first element of Count Six.

The second element that the government must prove beyond a reasonable doubt for Count Six is that the defendant knowingly used or carried a destructive device during and in relation to one of the specified crimes of violence or that the defendant knowingly possessed a destructive device in furtherance of the commission of one of the specified crimes of violence.

If you recall, the specified crimes of violence

* * *